S. HRG. 103–659

INTERNATIONAL CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION (EX. C, 95–2)

HEARING

BEFORE THE

COMMITTEE ON FOREIGN RELATIONS UNITED STATES SENATE

ONE HUNDRED THIRD CONGRESS

SECOND SESSION

MAY 11, 1994

Printed for the use of the Committee on Foreign Relations

U.S. GOVERNMENT PRINTING OFFICE

79–525 CC WASHINGTON : 1994

For sale by the U.S. Government Printing Office
Superintendent of Documents, Congressional Sales Office, Washington, DC 20402
ISBN 0-16-044740-2

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APPENDIX

INTERNATIONAL CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION (EX. C, 95–2)

WEDNESDAY, MAY 11, 1994

U.S. SENATE,
COMMITTEE ON FOREIGN RELATIONS,
Washington, DC.

The committee met, pursuant to notice, at 10:06 a.m., in room SD–419, the Dirksen Senate Office Building, Hon. Claiborne Pell (chairman of the committee) presiding.

Present: Senators Pell and Kerry.

The CHAIRMAN. The Committee on Foreign Relations will come to order. I would ask the Honorable John Shattuck, the Honorable Conrad Harper, and the Honorable Deval Patrick to come forward. I believe Mr. Patrick is here.

Mr. PATRICK. I am.

The CHAIRMAN. I believe you have another engagement afterward.

Mr. PATRICK. I do.

The CHAIRMAN. So let us start off with your testimony now, and then hope the State Department witnesses turn up as you are testifying. If not, we will move on to the public panel.

So we are now hearing from the Honorable Deval Patrick, Assistant Attorney General, Civil Rights Division, Department of Justice.

STATEMENT OF DEVAL PATRICK, ASSISTANT ATTORNEY GENERAL, CIVIL RIGHTS DIVISION, DEPARTMENT OF JUSTICE

Mr. PATRICK. Mr. Chairman, thank you very much, and to the members of the committee.

I am very pleased to appear today in support of the International Convention on the Elimination of All Forms of Racial Discrimination. I have a formal statement, which I believe has been distributed. And I ask that that written statement be made a part of the record.

The CHAIRMAN. That will be done without objection.

Mr. PATRICK. Mr. Chairman, I will be brief in my remarks. It is particularly appropriate, in our view, that this committee should take up this Convention, since it draws so heavily on the principles and protections developed in this country through many years of struggle in Congress and in the courts.

Because of the civil rights protections that we have created and developed in this country, ratification of the Convention will not re-

quire changes in domestic law. And that is an important point to see.

The body of law developed since the Civil War, and particularly in the 40 years since the Supreme Court's decision in *Brown* v. the *Board of Education,* through legislation, court decisions, and Executive action is a model for the world.

Five separate provisions of the Constitution have been relied upon in creating these protections. The three amendments adopted shortly after the Civil War provide core protections.

The 13th amendment abolished slavery and gave Congress broad authority to eliminate the badges and incidents of slavery.

Congress has exercised that authority to ensure against racial discrimination in contracts and in the ownership of property.

The 14th amendment, through its clause ensuring the equal protection of the law, has been the vehicle through which segregation and other forms of invidious racial discrimination have been rendered unlawful in schools, government services, government employment, and all other activities undertaken by a State.

Pursuant to the equal protection clause, State action that draws distinctions based on race is normally subject to strict scrutiny and can survive only in those instances when it is justified by compelling interests.

The 15th amendment provides that the right to vote will not be denied on account of race. It serves, in part, as the basis for the Voting Rights Act, which has helped to bring millions of minority voters into the political process, and to make that fundamental right of citizenship available to and meaningful for all Americans.

Two other constitutional provisions that are not as immediately associated with civil rights have nonetheless provided the authority for crucial congressional action to combat racial discrimination.

Congress relied upon the commerce clause in passing titles II and VII of the Civil Rights Act of 1964. Title II prohibits discrimination in places of public accommodation, a broad term that includes such things as restaurants, hotels, theaters, golf courses, and gas stations.

Title II, however, does not reach truly private clubs and other places not open to the public, recognizing that a sphere of genuinely private activity should remain beyond governmental regulation and giving rise to the need for the reservation regarding private activities.

Title VII prohibits discrimination by private and governmental employers of more than 15 employees in hiring, firing, and the terms and conditions of employment. Employees of smaller employers have similar protections pursuant to section 1981, a post-Civil War statute.

Congress also relied in part on the commerce clause in passing the Fair Housing Act of 1968. That prohibits, as you know, discrimination in the sale or rental of housing, and in lending, insurance, and the provision of brokerage services.

Finally, Congress relied on its spending power to enact title VI of the Civil Rights Act of 1964, which ensures that no person will be denied participation in or the benefits of any federally funded program on account of race.

The coverage provided by title VI expands with each new expenditure of Federal funds.

As this brief overview demonstrates, this Nation's legal protections against discrimination, based on race, are comprehensive. They are particularly so when one takes into account the many protections provided at the State and local levels as well.

Indeed, in many jurisdictions the State and local protections exceed those of the Federal authority. These protections are backed up by a variety of enforcement mechanisms.

The Civil Rights Division enforces a number of these laws, as you know. The Department of Housing and Urban Development has extensive enforcement responsibilities regarding fair housing.

The Equal Employment Opportunity Commission enforces title VII against private employers.

Each Federal agency is responsible for ensuring that its programs are free of racial discrimination. And, of course, individual victims of discrimination may go to court to enforce the laws I have discussed, and, in many instances, can resolve those issues in administrative proceedings.

This framework of legal prohibitions and enforcement mechanisms not only satisfies the requirements of the Convention, but serves as an example to the world, of which this country should be very proud indeed.

It is time to proclaim to the international community our confidence in our legal system, and the strength of our commitment to purge racial discrimination from this Nation and the other nations of the world.

I, therefore, urge the committee to support the Convention.

Thank you very much, Mr. Chairman.

The CHAIRMAN. Thank you very much, Mr. Patrick. As I said earlier, your full statement will be inserted in the record.

Mr. PATRICK. Thank you, Mr. Chairman.

[The prepared statement of Mr. Patrick follows:]

PREPARED STATEMENT OF MR. PATRICK

Mr. Chairman and Members of the Committee, it is a pleasure to appear before this Committee with my distinguished colleagues Mr. Shattuck and Mr. Harper in support of the International Convention on the Elimination of All Forms of Racial Discrimination. In his statement, Mr. Harper mentioned the array of domestic civil rights law that convinces us that, with the reservations and understandings noted by Mr. Harper, the Convention is compatible with existing civil rights protections provided by United States law and will not require the enactment of new legislation. In preparing to assume the leadership of the Civil Rights Division, I had the welcome opportunity to review the civil rights protections that have been developed in this country through legislation, executive action, and court decisions since the Civil War and particularly in the 40 years since the landmark decision in *Brown* v. *Board of Education*. That body of law is indeed impressive and serves as a model for the world. Ratification of this Convention, which draws so heavily from our own efforts to combat racial discrimination, is long overdue.

Rather than recite domestic law line-by-line, I refer the Committee to the detailed analysis of that law that was developed in consultation by the Department of State and the Department of Justice. I would like simply to describe for you some of the highlights of our civil rights protections that are relevant to the Convention.

Five separate provisions of the Constitution have been relied upon by Congress and the courts in prohibiting racial discrimination. The three Amendments adopted shortly after the Civil War provide core protections. The Thirteenth Amendment prohibits slavery and gives Congress authority to enforce the prohibition through appropriate legislation. Significantly, the Thirteenth Amendment authorizes Congress to prohibit private as well as governmental discrimination. Congress used that

authority after the Civil War to enact a series of statutes that continue to supply important protections against discrimination. 42 U.S.C. 1981, which prohibits racial discrimination in contracts, still forms the basis for numerous allegations of racial discrimination in employment and education. It was amended in 1991 to ensure that it would apply to all aspects of the formation, performance, and enforcement of a contract. 42 U.S.C. 1982 prohibits discrimination in the purchase, sale, or lease of property. 42 U.S.C. 1985 prohibits conspiracies to deprive others of federally secured rights.

The Equal Protection Clause of the Fourteenth Amendment, which provides that "no state shall deny to any person within its jurisdiction the equal protection of the laws," has been fundamental in the effort to eliminate racial discrimination. Pursuant to this clause, the Supreme Court has subjected state action that draws distinctions based on race to strict—usually fatal—scrutiny and has held that such action can survive only if narrowly tailored to achieve a compelling interest. The Equal Protection Clause of the Fourteenth Amendment and the similarly interpreted equal protection component of the Fifth Amendment, which applies to actions of the federal government, have been the instruments for the elimination of government imposed segregation from all aspects of our public life.

The Fifteenth Amendment protects the right to vote from abridgement or denial on the basis of race. It serves, in part, as the basis for the Voting Rights act of 1965. That Act, which has helped to bring millions of minority voters into the political process and made their participation meaningful, was amended in 1982 to prohibit practices that result in denial or abridgement of the right to vote.

Two other constitutional provisions not generally associated with racial discrimination have given Congress important authority to enact legislation. The first is the Commerce Clause, which Congress relied upon in enacting Titles II and VII of the Civil Rights Act of 1964, as well as the Fair Housing Act of 1968. Title II of the 1964 Act prohibits discrimination in places of public accommodation, which are defined broadly to include such things as restaurants, hotels, theatres, golf courses, and gasoline stations. Title II, however, in recognition that in a free society some sphere of private activity should remain beyond governmental regulation, does not reach private clubs and other places not open to the public. This exception gives rise to the need for the reservation regarding private activities that Mr. Harper discussed.

Title VII is the principle federal prohibition against discrimination in employment. It forbids discrimination on the basis of race by private and governmental employers in hiring, firing, and the terms and conditions of employment. Title VII applies to employers of 15 or more employees. Smaller employers are prohibited from engaging in intentional discrimination on the basis of race by 42 U.S.C. 1981.

In 1968, Congress, as part of the Civil Rights Act of 1968, passed the Fair Housing Act, which prohibits discrimination on the basis of race in the sale or rental of housing and in lending, insurance, and brokerage services. This Act was amended in 1988 to enhance its enforcement mechanisms and increase the penalties for a violation. As part of that same Civil Rights Act of 1968, Congress enacted 42 U.S.C. 245, which imposes criminal penalties for the use of force or threats of force to interfere because of race with a range of federally protected activities.

In addition to the Commerce Clause, Congress has also relied on its constitutional Spending Power to combat racial discrimination. Title VI of the Civil Rights Act of 1964, which was predicated on Congress' Spending Power, states that no person shall be excluded from participation in, or be denied the benefits of, any federally funded program or activity on account of race. The reach of title VI has expanded with each expansion of federal spending. It has come into visible play in combating school segregation, including in higher education, but the protection reaches across the full range of federal services, benefits, and programs.

As this very brief summary demonstrates, the obligations imposed by Article 5 of the Convention appear well met by existing federal civil rights law and we do not believe that any new legislation would be required if it were ratified. We are bolstered in this conclusion by the myriad laws against racial discrimination enacted at the state and local levels.

These legal protections are enforced by a variety of mechanisms. The Civil Rights Division of the Department of Justice has responsibility to enforce a number of civil rights laws. The Department of Housing and Urban Development has extensive enforcement responsibilities pursuant to the Fair Housing Act. The Equal Employment Opportunity Commission enforces Title VII of the Civil Rights Act of 1964 against private employers. All federal agencies have responsibility for ensuring that their programs and activities are free of racial discrimination as required by Title VI of the 1964 Act. And, of course, private individuals may enforce in court many of the laws I have mentioned.

As Mr. Harper noted in his statement, there were several issues that we identified in our review of the treaty that did not merit a reservation or understanding, but may warrant some explanation. One of those is that the Convention defines "racial discrimination" to include distinctions based on "race, colour, descent, or national or ethnic origin." The domestic protection that I have discussed all apply to race, color, and national origin, but "descent" and "ethnic" origin are not terms that traditionally appear in our anti-discrimination law. The terms race, color, and national origin, however, have been interpreted broadly in domestic law. For example, in *Saint Francis College* v. *Al-Khazraji,* 481 U.S. 604 (1987), the Supreme Court held that discrimination against a person of "Arabian ancestry" is prohibited by 42 U.S.C. 1981, and in *Shaare Tefila Congregation* v. *Cobb,* 481 U.S. 615 (1987), it held that 42 U.S.C. 1982 prohibits discrimination against Jews. The State Department advises that there is nothing in the negotiating history of the treaty that would suggest that the meaning of "descent" or "ethnic origin" extends beyond existing prohibitions of discrimination based on race, color, and national origin.

A second area worthy of mention is affirmative action. Article 1(4) of the Convention states that it shall not be considered racial discrimination for States Parties to the Convention to take "special measures * * * for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals" to ensure that they experience "equal enjoyment or exercise of human rights and fundamental freedoms." This provision goes on to state that such measures shall not be deemed racial discrimination only if they do not "lead to the maintenance of separate rights for different racial groups and that they shall not be continued after the objectives for which they were taken have been achieved." Article 2(2) provides that "States Parties shall when the circumstances so warrant, take * * * special and concrete measures to ensure the adequate development and protection of certain racial groups or individuals belonging to them." This article again admonishes that these steps "shall in no case entail as a consequence the maintenance of unequal or separate rights for different racial groups after the objectives for which they were taken have been achieved."

Taken together, these provisions permit but do not require States Parties to engage in some forms of affirmative action. Article 2(2) leaves it to the discretion of states parties to determine when circumstances warrant special measures. The United States and state and local governments engage in a large number of activities that would qualify as special measures under the Convention, including preferences for minority contractors, educational scholarships for minority students, affirmative action in employment, and race-conscious remedies for discrimination adopted in anticipation of litigation, through consent decrees, or imposed by courts following litigation.

While the legality of race-conscious measures has been a source of great debate in United States law, the constraints imposed by the Convention on such measures are thoroughly consistent with Supreme Court precedent. In determining the permissibility of racially preferential activities by the federal government, the Court has required that they "serve important governmental objectives within the power of Congress and are substantially related to achievement of those objectives." *Metro Broadcasting, Inc.* v. *FCC,* 497 U.S. 547, 564–565 (1990). Racial preferences adopted by local governments have been subjected to more searching inquiry, but are valid if they are narrowly tailored to serve compelling government interests, such as remedying prior discrimination by the local government or in sectors or industries with which the government deals, such as contractors. See *City of Richmond* v. *J.A. Croson,* 488 U.S. 469 (1989). The limitation imposed by the Convention—that affirmative action measures may not be maintained "after the objectives for which they were taken have been achieved"—is consistent with both of these lines of precedent. Thus, the Convention would not impose new obligations to undertake race-conscious measures, nor would it restrict those measures already undertaken in the United States.

In conclusion, this country has developed a system of legal protections against discrimination on the basis of race of which we can be proud. It is time that we proclaimed to the international community our confidence in our legal system, and the strength of our commitment to purge racial discrimination from this nation and the other nations of the world.

The CHAIRMAN. The Convention focuses on racial and ethnic discrimination in the field of "public affairs." How broad is the definition of public affairs and what kind of activities are not covered by the Convention?

Mr. PATRICK. Well, I will hesitate to speak on the breadth of the Convention and simply say, Mr. Chairman, that from our point of view as experts, if you will, in the scope of American law, the notion of private activity is secure from governmental regulation in at least one context, which is the context of genuinely private clubs.

And that is a provision written into the public accommodations law by the Congress. I do not believe that the Convention, as I understand it, anticipates any broader scope of application than that.

The CHAIRMAN. And what kind of activities are not covered by the Convention? Would an athletic club, for example, be covered?

Mr. PATRICK. To my understanding, Mr. Chairman, if the club is genuinely private it would not be covered by the Convention.

The CHAIRMAN. I also have one further question. What steps would have to be taken to fulfill the obligation that is created under the Convention to eliminate discrimination in the field of health care?

Mr. PATRICK. In the field of—I am sorry, Mr. Chairman.

The CHAIRMAN. In the field of health care.

Mr. PATRICK. Well, as you know, with the health care bills pending there are civil rights provisions in those bills which we are taking part in evaluating from the perspective of the Civil Rights Division.

My understanding, though, is that the Convention would not impose on the health care field or any other obligations that do not already exist under domestic American law.

The CHAIRMAN. Thank you very much. You are free to stay here or——

Mr. PATRICK. Thank you, Mr. Chairman.

The CHAIRMAN [continuing]. You may be excused.

Mr. PATRICK. If you will permit me, I will excuse myself.

The CHAIRMAN. OK.

Mr. PATRICK. Thank you.

The CHAIRMAN. This morning the committee is holding this hearing on the International Convention on the Elimination of All Forms of Racial Discrimination.

The Convention was adopted unanimously by the General Assembly in December 1965. It is one of several instruments designed by the international community to implement the human rights articles of the U.N. Charter. It is a widely accepted treaty, with more than 135 states as parties.

The United States signed the Convention in September 1966, shortly after it came into force. The Carter administration transmitted it to the Senate in February 1978. It has been pending ever since because the previous two administrations did not support ratification.

This Convention is an important instrument in the international community's struggle to eliminate racial and ethnic discrimination. As a Nation which has gone through its own struggle to overcome segregation and discrimination, we are in a unique position to lead the international effort.

Our position and the credibility of our leadership will be strengthened immeasurably by the ratification of this Convention.

The administration supports ratification of it with a limited package of conditions.

This morning, three administration witnesses will be discussing the Convention and the reasons why the administration feels these conditions are necessary.

We have already heard from the Honorable Deval Patrick, Assistant Attorney General, the Department of Justice.

And now I would welcome the Honorable John Shattuck, the Assistant Secretary of State for Democracy, Human Rights, and Labor, the Department of State, who is here with the Honorable Conrad Harper, legal adviser, Department of State. We will start off with Mr. Shattuck.

STATEMENT OF JOHN SHATTUCK, ASSISTANT SECRETARY OF STATE DEMOCRACY, HUMAN RIGHTS, AND LABOR, U.S. DEPARTMENT OF STATE

Mr. SHATTUCK. Thank you very much, Mr. Chairman.

I appreciate the opportunity to appear before you again, and I thank you for your strong support of so many important elements of our Nation's foreign policy in the field of human rights.

Mr. Chairman, we are here today to testify on the subject of the treaty to end racial discrimination. Today we encounter difficult and deeply disturbing problems in the world scene, perhaps none as ominous as racial and ethnic conflict.

Some of these conflicts are of longstanding importance or longstanding existence, and others are more recent vintage.

Today we see ethnic and racial tensions being exploited for political ends, being fanned into violent conflagration, or insidiously at work in societies around the world.

Under the Convention that we are here to discuss with you this morning, the states parties are required to take steps to eliminate racial discrimination; to prohibit segregation and apartheid; to condemn racial propaganda and racist organizations; to guarantee equal legal, political, and human rights to all, regardless of race, nationality, or ethnicity; to ensure effective remedies against violations; and to combat prejudice and promote tolerance, and education, and culture.

The Convention also establishes an autonomous Committee on the Elimination of Racial Discrimination to review mandatory reports by the states parties and submit its own annual report to the General Assembly.

History has shown that these sorts of conventions and review processes can and have been effective in furthering human rights goals.

The accomplishments of the International Labor Organization, the Commission for Security and Cooperation in Europe, and the Helsinki Commission are all examples of the ways in which human rights protections can be encouraged by the sort of instrument we are putting before you today.

The question that naturally arises with respect to this Convention is: Why are we moving to ratify this Convention now, some 28 years after it came into being, and some 16 years after it was first presented to the Senate?

The answer is that ratification is long overdue, and that this Convention will be a valuable tool as we steer a course on the new and challenging international scene we now confront.

During the cold war, as we all know, much of the human rights agenda, including the fight against racial discrimination, became a political football. That is no longer the case.

We are now seeing real material progress in combating racial and ethnic discrimination in some very important parts of the world.

In South Africa, the great panoply that is unfolding before our eyes of the courageous leadership of Nelson Mandela, and now President Mandela, and former President F.W. De Klerk, and the heroic efforts of millions of people of goodwill, are closing the book on apartheid and moving to democracy for all the people of South Africa. This should be an inspiration for the work of this Convention around the world.

At the recent U.N. Human Rights Commission meeting in Geneva we succeeded in securing a forthright condemnation of anti-Semitism for the first time in the U.N.'s history, another very long overdue condemnation, I might add.

Sadly, however, the picture is not solely of progress. In fact, in many ways it is fair to say that one of the supreme challenges facing the United States and our allies in the coming years is to learn how to diffuse and handle bitter confrontations over racial and ethnic differences.

The Balkans are only the most vivid example of what can happen when racial and ethnic antagonisms are exploited to fuel violence when minorities are fearful of discrimination within new polities or moved to aggression against other groups, an experience that I also had the opportunity to witness first hand in a trip that I made last week to east central Africa.

It goes without saying that racial and ethnic discrimination present very complex problems for policymakers, and our ratification of the Race Convention is no panacea. But ratification is essential for several reasons.

First, by ratifying the Convention we will be better able to hold other signatories to their commitments. We need no longer fear that in so doing we would be playing into the hands of geopolitical adversaries.

Instead, we can use the Convention as a reference point in our bilateral dealings with states, and we will strengthen our position in multilateral gatherings.

Second, we could be a more effective part of the discussion now taking place over evolving international norms in the world. If we are not fully and actively engaged in this debate, then others will be setting the international community's agenda on race discrimination.

One forum for the discussion is the Committee on the Elimination of Racial Discrimination, where we cannot currently participate, because we have not yet ratified the Convention.

Third, this would be part of our effort to inject new American energy and purpose into the U.N. human rights system, which, until now, has frankly not been as consistent and effective as we have hoped.

One of the lessons of last year's World Conference on Human Rights in Vienna was that multilateral bodies and nongovernmental organizations are playing an increasingly wide-reaching role in shaping the post-cold war world.

And we are glad that our efforts to create a U.N. High Commissioner for Human Rights met with success. By working with and through multilaterals and nongovernmental organizations, we can enhance our effectiveness on the world scene in this very important field.

For all of these reasons, Mr. Chairman, I urge you to advise ratification of the Convention, and I would be very glad to discuss this with you and answer your questions.

Thank you.

The CHAIRMAN. Thank you very much, Mr. Shattuck.

[The prepared statement of Mr. Shattuck follows:]

PREPARED STATEMENT OF MR. SHATTUCK

Mr. Chairman and distinguished Members, I am pleased to appear before you today to urge favorable consideration of the International Convention on the Elimination of All Forms of Racial Discrimination.

Mr. Chairman, it is by now a truism that with the passing of the Cold War and of the great ideological struggles that have defined our century, we stand on the threshold of a new and uncharted world. In this time, the principles tested in that painful struggle, ought to guide us. Among them are democracy, human rights and the rule of law. These principles are deeply rooted in the fabric of American history and represent the aspirations of men and women the world over. Under President Clinton's leadership, the United States is turning them into building blocks of the new post-Cold War world.

Today, we encounter difficult and deeply disturbing problems on the world scene, perhaps none as ominous as racial and ethnic conflict. Some ethnic conflicts are of long-standing, others are of more recent vintage. Today we see ethnic and racial tensions being exploited for political ends, being fanned into violent conflagration, or insidiously at work in societies.

That is why, Mr. Chairman, it is so important that we place the stature of the United States firmly behind this effort to eliminate any and all racial and ethnic discrimination in law and policy-making.

Mr. Chairman, we in the United States know all too well how even the noblest democratic experiments can be poisoned and blighted by racial discrimination. Racial discrimination stands in direct contradiction to the basic tenets of American democracy. Through profound struggle we have done much to realize the ideal of equality before the law. What we seek to achieve through ratification of the Race Convention before you is to incorporate the lessons we have learned into the emerging framework of the post-Cold War world.

Under the Convention, the states parties are required to take specific steps to eliminate racial discrimination, to prohibit segregation and apartheid, to condemn racial propaganda and racist organizations, to guarantee equal legal, political and human rights to all, regardless of race, nationality or ethnicity, to ensure effective remedies against violations, and to combat prejudice and promote tolerance in education and culture. The Convention also establishes an autonomous Committee on the Elimination of Racial Discrimination to review mandatory reports by the states parties and submit its own annual report to the General Assembly.

History has shown that these sorts of conventions and review processes can and have been effective in furthering human rights goals. The accomplishments of the ILO, the CSCE and the Helsinki Commission, are all examples of the ways in which human rights protections can be encouraged by the sort of instrument we are putting before you today.

My colleagues here today are devoting their remarks to the legal implications of the Convention, and to the U.S. government's respective understandings and reservations. Suffice it for me to say that if the United States ratifies this Convention, we will be displaying on the international scene our commitment to the elimination of racial discrimination, and with it the deep injustice and social and political dislocation it brings.

The question naturally arises: why are we moving to ratify this Convention now, some 28 years after it came into being and some sixteen years after it was first presented to the Senate?

The answer is that ratification is long overdue,, and that this Convention will be a valuable tool as we steer a course on the new and challenging international scene we now confront.

During the Cold War, as we all know, much of the human rights agenda, including the fight against racial discrimination, became a political football. That is no longer the case. We are now seeing real, material progress in combating racial and ethnic discrimination.

In South Africa, the courageous leadership of Nelson Mandela and F.W. De Klerk, and the heroic efforts of millions of people of goodwill, are closing the book on apartheid and moving to democracy for all the people of South Africa.

At the recent UN Human Rights Commission meeting in Geneva we succeeded in securing a forthright condemnation of anti-Semitism for the first time in the UN's history.

Sadly, however, the picture is not solely of progress. It is fair to say that one of the supreme challenges facing the United States and our allies in the coming years is to learn how to defuse and handle bitter confrontations over racial and ethnic differences. The Balkans are only the most vivid example of what can happen when racial and ethnic antagonisms are exploited to fuel violence, when minorities are fearful of discrimination within new polities or moved to aggression against other groups.

It goes without saying that racial and ethnic discrimination present very complex problems for policymakers, and our ratification of the Race Convention is no panacea. But ratification is essential for several reasons.

First, by ratifying the Convention, we will be better able to hold other signatories to their commitments. We need no longer fear that in so doing we would be playing into the hands of geopolitical adversaries. Instead, we can use the Convention as a reference point in our bilateral dealings with states, and we will strengthen our position in multilateral gatherings.

Second, we could be a more effective part of the discussion now taking place over evolving international norms in the world. If we are not fully and actively engaged in this debate, then others will be setting the international community's agenda on race discrimination. One forum for the discussion is the Committee on Racial Discrimination, where we cannot currently participate because we have not ratified the Convention.

Third, this would be part of our effort to inject new American energy and purpose into the UN human rights system, which, until now, has frankly not been as consistent and effective as we have hoped. One of the lessons of last year's World Conference on Human Rights in Vienna was that multilateral bodies and nongovernmental organizations are playing an increasingly wide-reaching role in shaping the post-Cold War world. And we are glad that our efforts to create a UN High Commissioner for Human Rights met with success. By working with and through multilaterals and NGOs we can enhance our effectiveness on the world scene.

Once we have ratified the Convention, our participation in the work of the Committee will give us a greater opportunity to share our own hard-won and historically proven experience in promoting tolerance and ending discrimination with other countries, and especially with the world's newly democratic nations.

In conclusion, Mr. Chairman, we have much to gain from ratifying this Convention. While it will not magically solve the world's racial and ethnic tensions, it will enable us to work more constructively in addressing those problems than we otherwise could.

For these reasons I urge you to advise ratification of the Convention, and I would be glad to discuss this with you further.

Thank you.

The CHAIRMAN. Now we will hear from Mr. Harper.

STATEMENT OF CONRAD K. HARPER, LEGAL ADVISER, U.S. DEPARTMENT OF STATE

Mr. HARPER. Thank you, Mr. Chairman.

It is a pleasure to see you once again and to be before you on this occasion. I am here, of course, to testify in support of the International Convention on the Elimination of All Forms of Racial Discrimination.

The Clinton administration is committed to eradicating race-based discrimination in our society, and to ensuring equal opportunity for all. Respect for human rights and individual dignity, regardless of racial or ethnic background, is a fundamental tenet of a just and civilized society.

The International Convention on the Elimination of All Forms of Racial Discrimination is an important expression of this commitment. The Convention was signed by the United States in 1966, as you have noted, and transmitted to the Senate for its advice and consent to ratification in 1978. Apart from the hearing before the Senate Foreign Relations Committee in 1979, no further action has been taken until now.

On behalf of the President, we are here today to urge the Senate Foreign Relations Committee to report favorably on this Convention with a recommendation that the Senate give its advice and consent to prompt ratification.

I have, for the record, submitted written testimony and accompanying documentation which explains in detail the precise provisions of the Convention and its relationship to existing U.S. law.

Let me briefly summarize for you the relatively few reservations, declarations, and understandings we have proposed in order to make clear that the scope of U.S. obligations under the Convention is consonant with U.S. law. These qualifications do not undermine in any way the central purpose or object of the Convention.

Because the Convention embodies the antidiscrimination principles undergirding our legal structure, we have submitted only three reservations, the most important of which is required by the first amendment of our Constitution.

Specifically, we have proposed a reservation regarding article 4 of the Convention, which requires states parties to condemn propaganda and organizations based on racial hatred or superiority.

Article 4 requires states parties (1) to make criminal the dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, and acts of violence or incitement of such acts against any race or group or persons of other color or ethnic origin; to prohibit organizations and propaganda which promote and incite racial discrimination; and (3) to forbid public authorities or institutions, national or local, from promoting or inciting racial discrimination.

As a matter of national policy, the U.S. Government has long condemned racial discrimination and has engaged in many activities designed to combat prejudices leading to racial discrimination and to promote tolerance and understanding among racial and ethnic groups.

Nonetheless, because the right to free expression is a fundamental value in our constitutional structure, any governmental restrictions on freedom of expression and expressive activity must be viewed with suspicion and must survive the most stringent scrutiny.

Although speech likely to cause imminent violence and certain forms of bias-related criminal conduct may be proscribed consistent with the first amendment, Government generally may not impose regulations aimed at the content of expression.

Because article 4 mandates the suppression and criminalization of certain expression because of its content, and also implicates freedom of association, we believe it is inconsistent with existing first amendment principles.

We have thus proposed a reservation indicating that reservation indicating that the United States will not accept any obligation to restrict rights to free expression and association protected by the U.S. Constitution and laws. The text of this reservation is set forth in pages 11 and 12 of the detailed legal analysis to which I earlier referred.

We have proposed a second reservation, which pertains to private conduct, because we are concerned that certain provisions in the Convention might be interpreted as prohibiting conduct beyond the proper scope of governmental regulation under existing U.S. law.

As explained in greater detail in our legal analysis, the Constitution and laws of the United States establish extensive protection against discrimination, including certain conduct by private actors.

The "State action" requirement of the 14th amendment recognizes that in certain cases conduct by private individuals is actionable if such conduct is "fairly attributable" to the State.

Likewise, the Federal Civil Rights Statute, 42 U.S.C., section 1983, reaches conduct by individuals acting "under color of law," that is State law.

In addition, the 13th amendment's prohibition against slavery and involuntary servitude encompasses private as well as governmental action.

Congress may regulate private conduct, not only through the 13th amendment, but also through its article I, commerce and spending powers, as it did in passing title II and title VII of the 1964 Civil Rights Act, which, respectively, prohibit private entities from discriminating in public accommodations and employment.

The Government's ability to proscribe certain private conduct is, however, not without limit. Our constitutional framework recognizes that individual freedom and protection from governmental interference are vital to a free and democratic society.

For this reason, some private conduct is not actionable, even if discriminatory, provided that no nexus exists between individual and governmental action.

Exactly how far the drafters of the Convention intended to regulate discriminatory conduct remains unclear. The negotiating history of the Convention is ambiguous. The Committee appears to have adopted an expansive view of the Convention's reach.

Because we wish to make clear that the obligations undertaken by the United States are limited by our constitutional and statutory provisions, we have proposed a reservation indicating that to the extent that the Convention calls for broader regulation of private conduct, the United States does not accept any obligation to enact legislation or take other measures with respect to private conduct except as mandated by the Constitution and laws of the United States.

We believe such a measure is prudent and will ensure that the United States does not embrace any obligation it cannot appropriately assume.

The third reservation we have submitted concerns submission of disputes under the Convention to the jurisdiction of the International Court of Justice. This reservation parallels those previously taken, with the approval of the Senate, to the Genocide and Torture Conventions.

Although this administration strongly supports the use of international dispute resolution mechanisms in appropriate cases, we believe it is prudent for the U.S. Government to retain the ability to decline to become involved in a case that may be brought by another country for frivolous or political reasons.

In any event, the International Court of Justice has not played any practical role under this treaty. Indeed, no case has ever been brought to the International Court of Justice under this Convention.

The primary mechanism for reviewing an implementation of the Convention is through consideration of reports submitted by states parties to the Committee on Elimination of Racial Discrimination.

The Committee also provides a mechanism for the resolution of state-to-state complaints. The United States plans to submit to both mechanisms. Finally, there is ample opportunity in the United States to seek redress of alleged acts of discrimination.

In addition to these three reservations, we have proposed an understanding which expresses our view that with respect to implementation of the Convention, the Federal Government will have responsibility over matters under its jurisdiction, and that otherwise implementation will be the responsibility of State and local governments.

This is to assure that ratification does not preempt State and local antidiscrimination initiatives. The understanding also makes clear that where States and localities have jurisdiction over such measures, the Federal Government will ensure compliance.

We adopted a similar provision in ratifying the Covenant on Civil and Political Rights in 1992.

Finally, we have proposed a declaration indicating that the Convention's provisions will not be self-executing. As you know, under article VI, clause 2, of the Constitution, a duly ratified treaty becomes part of the supreme law of the land, equivalent to a Federal statute.

By making clear that this Convention is not self-executing, we ensure that it does not create a new or independently enforceable private cause of action in our courts.

We have proposed and the Senate has concurred in the same approach to earlier human rights treaties, such as the U.N. Convention Against Torture and Other Cruel, Inhuman, and Degrading Treatment or Punishment in 1990, and the International Covenant on Civil and Political Rights in 1992.

As was true with the earlier treaties, existing U.S. law provides extensive protection and remedies against racial discrimination sufficient to satisfy the requirements of the present Convention.

In addition, Federal, State, and local laws already provide a comprehensive basis for judicial challenge to discriminatory statutes, regulations, and other governmental action, as well as certain forms of discriminatory conduct by private actors.

There is thus no need for the establishment of additional causes of action to enforce the requirements of the Convention.

By adopting only these few proposed reservations, declarations, and understandings, we signify the seriousness with which the United States accepts the obligations imposed by the Convention.

By being forthright about the legal constraints under which we operate, and specific about our obligations, we make clear that we can, in fact, meet the obligations that ratification of the treaty will entail in a manner fully consistent with our Constitution and law.

Since the major thrust of the Convention comports with U.S. law, the qualifications on our ratification are few and do not undermine the central tenets or purposes of the Convention.

I also wish to point out that we identified other issues about which the Senate should be aware, but which do not warrant inclusion in the Senate's resolution of advice and consent or in the instrument of ratification as specific reservations or understandings.

Our analysis of each of these issues is set forth in the detailed legal memorandum, which we hope will become part of the Committee's report on the Convention so that it will be readily accessible to interested parties.

In sum, Mr. Chairman, the International Convention on the Elimination of All Forms of Racial Discrimination embodies the antidiscrimination principles animating U.S. law.

Our ratification of this Convention, long awaited by other countries, will be an important expression of our commitment to eradicate unlawful racial and ethnic discrimination and to ensure equal opportunity for all.

By demonstrating our resolve to eliminate discrimination at home, we shall encourage respect for human rights and the rule of law abroad and, in so doing, join with other nations in building a fairer, more pluralistic, and ultimately more just environment for everyone.

If I may be permitted one additional comment, Mr. Chairman, I want to express our appreciation for the assistance and cooperation of the nongovernmental organizations, as well as your committee staff, in the preparation for this hearing.

We have consulted widely with the NGO human rights community during our work on formulating the administration's position on this treaty.

While we have not always agreed on how best to approach each aspect, we have had a very professional discussion with them, and we have given their views the most serious consideration.

We have also consulted with committee staff and have likewise taken into account the views provided to us in that context. We hope to be able to continue working closely as we address additional treaties.

Thank you very much.

The CHAIRMAN. Thank you very much, indeed.

[The prepared statement of Mr. Harper follows:]

PREPARED STATEMENT OF MR. HARPER

Mr. Chairman and Members of the Committee: I am pleased to appear before you today to testify in support of the International Convention on the Elimination of All Forms of Racial Discrimination.

The Clinton Administration is committed to eradicating race-based discrimination in our society and ensuring equal opportunity for all. Respect for human rights and individual dignity—regardless of racial or ethnic background—is a fundamental tenet of a just and civilized society.

Over the past century, we have made significant advances in the struggle for racial equality in this country. Our Constitution and laws establish important safeguards for ensuring that individuals are not denied employment, housing, education or other rights or benefits because of racial or ethnic animus. The principle of anti-discrimination is deeply embedded in our legal and social fabric.

But while we have made progress along the path to racial equality, we have more distance to travel. The Clinton Administration intends to make every effort to ensure that the goal of equal opportunity becomes ever more a reality.

The International Convention on the Elimination of All Forms of Discrimination is an important expression of this commitment. The Convention was signed by the United States in 1966 and transmitted to the Senate for its advice and consent to ratification in 1978. Apart from a hearing before the Senate Foreign Relations Committee in 1979, no further action has been taken. On behalf of the President, we urge the Senate Foreign Relations Committee to report favorably on this Convention with a recommendation that the Senate give its advice and consent to prompt ratification. Ratification of this Convention will send a clear signal of our commitment to eradicate unlawful racial and ethnic discrimination.

The Convention—already ratified by more than 135 countries—creates an important standard that members of the international community must strive to meet. Although the fundamental rights set forth in this treaty are already recognized in United States laws, not all countries have codified the principle of equal protection in their legal systems or permitted effective redress for acts of discrimination. By working collectively with other nations to eliminate unlawful discrimination based on race, color, descent, or national or ethnic origin, we shall promote respect for the rule of law and human rights abroad. This goal is particularly important in light of the extraordinary challenge to peace and security today that results from racial tension and ethnic conflict.

Ratification of this Convention will comport with our domestic laws. The substantive provisions of the Convention embody, with only a few exceptions, the requirements of the Constitution and laws of the United States. Where necessary, we have proposed a reservation, understanding or declaration to make clear that the scope of U.S. obligations under the Convention is consonant with U.S. law. Although such qualifications are relatively few and do not undermine in any way the central purpose or object of the Convention, they clarify our legal standards and ensure that our acceptance of the Convention is fully consistent with our Constitution and laws.

A detailed legal analysis of the treaty's requirements and their relationship to U.S. constitutional law, as interpreted over time by U.S. courts, was previously submitted to the Committee under separate cover on April 26 from the Acting Secretary of State, Strobe Talbott. For the convenience of the Committee, let me summarize the central provisions in the Convention and then explain the relatively few reservations, understandings and declarations we have submitted.

I

The Convention is designed to forbid racial and ethnic discrimination in all aspects of public life. **Articles 1(1)** defines "racial discrimination" as "any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life."

Although this definition is relatively broad, **Article 1(2)** and **Article 1(3)** imposes certain limits. For instance, the Convention does not apply to distinctions, exclusions, restrictions or preferences made between citizens and non-citizens; nor does it affect legal provisions concerning acquisition of nationality and citizenship or naturalization, provided that such provisions do not discriminate against any particular nationality. Moreover, **Article 1(4)** explicitly exempts "special measures" taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection. As a result, the Convention leaves undisturbed existing U.S. law regarding affirmative action programs.

Article 2 requires States Parties to take a series of specified steps or measures to eliminate racial discrimination, including

(a) ensuring that all public authorities and institutions act in conformity with that basic obligation;

(b) not sponsoring, defending or supporting racial discrimination by any persons or organizations;

(c) reviewing governmental policies and amending, rescinding or nullifying discriminatory laws and regulations at all levels of political organization;

(d) bringing to an end, by all appropriate means, racial discrimination by "any persons, group or organization"; and

(e) encouraging, where appropriate, integrationalist multi-racial organizations and movements.

Under **Article 3,** States Parties condemn racial segregation and apartheid and agree to prevent, prohibit and eradicate all such practices in territories under their jurisdiction.

Article 4 requires States Parties to condemn propaganda and organizations based on racial hatred or superiority.

Under **Article 5,** States Parties undertake to guarantee the right of everyone, without distinction as to race, color or national or ethnic origin, to equality before the law in the enjoyment, among others, of the rights to equal treatment before the courts; security of the person and protection against violence and bodily harm; political rights including universal and equal suffrage; freedom of movement and residence, peaceful assembly and association, thought, conscience, religion, opinion and expression; the right to nationality, marriage, to own and inherit property, and to work, to form and join unions; to housing, medical care, education, cultural activities, and access to public facilities.

Article 6 requires States Parties to ensure everyone within their jurisdiction effective protection and remedies against acts of discrimination which violate human rights and fundamental freedoms contrary to this Convention, including the right to seek just and adequate reparation or satisfaction for any damage suffered as a result of such discrimination.

Finally, under **Article 7,** States Parties undertake to institute measures to combat prejudice and promote tolerance in the fields of teaching, education, cultural and training.

As an oversight mechanism, the Convention establishes in **Articles 8–16** a Committee on the Elimination of Racial Discrimination, an autonomous body of eighteen experts of high moral standing and acknowledged impartiality who are elected by States Parties to four year terms. This Committee considers detailed reports from States Parties on the legislative, judicial, administrative or other measures they have adopted or which give effect to the provisions of the Convention. The first such report is due within one year of entry of the Convention into force for the State concerned; supplementary reports are due thereafter every two years. The Committee also submits an annual report to the UN General Assembly.

The Committee generally meets twice a year, usually in New York or Geneva. Although it is not a court, it may hear complaints by one State Party against another concerning non-compliance with Convention requirements. Such disputes, if not settled by mutual agreement, may be resolved by the Committee or, in its discretion, referred to a non-binding conciliation commission. To date, no such disputes have been brought.

States parties may by declaration, on an optional basis, also recognize the competence of the Committee to consider communications from individuals or groups claiming to be victims of a violation by that State of any of the rights set forth in the Convention. The United States has not availed itself of this option. A State that makes such a declaration also may establish a national body to receive and consider such petitions from individuals within its jurisdiction on an initial basis; petitioners who fail to receive satisfaction from such a body within six months may communicate directly with the Committee.

Both mechanisms—the individual and the state-to-state—are non-binding. The Convention contains no provision for the referral of either state-to-state complaints or individual petitions from the Committee to the International Court of Justice. **Article 22** of the Convention does provide, however, that disputes between two or more Parties with respect to the interpretation or application of the Convention, which are not settled by negotiation or other methods, may be submitted to the ICJ at the request of either Party.

II

As a general matter, the substantive provisions of the Convention reflect the anti-discrimination principles inherent in our constitutional scheme. They require the United States to do what it already is legally obligated to do: eradicate unlawful racial or ethnic discrimination. Ratification of this Convention will constitute an important expression of U.S. commitment to fulfill its legal obligation to ensure equality under law.

Nonetheless, while the Convention generally comports with U.S. laws, certain provisions appear either to be inconsistent with current law or sufficiently ambiguous as to warrant additional clarification. As a result, we have proposed several reservations, declarations and understandings to clarify the nature and scope of the obligations we shall undertake.

The most important of these is required by the First Amendment to our Constitution. Specifically, we have proposed a reservation regarding Article 4 of the Convention, which, as noted above, requires States Parties to condemn propaganda and organizations based on racial hatred or superiority. Article 4 requires States Parties (a) make to criminal the dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, and acts of violence or incitement to such acts against any race or group of persons of another color or ethnic origin; (b) to prohibit organizations and propaganda which promote and incite racial discrimination; and (c) to forbid public authorities or institutions, national or local, from promoting or inciting racial discrimination.

As a matter of national policy, the United States Government has long condemned racial discrimination and has engaged in many activities designed to combat prejudices leading to racial discrimination and to promote tolerance and understanding among racial and ethnic groups. Such programs include those under the authority of Title VI of the Civil Rights Act of 1964, the Bilingual Education Act, the Mutual Educational and Cultural Exchange Act of 1961, the International Education Act, and the National Foundation on the Arts and Humanities Act of 1965.

Nonetheless, because the rights to free expression and association are fundamental values in our constitutional structure, any governmental restrictions on expressive activity must be viewed with suspicion and survive the most stringent scrutiny. Although speech likely to cause imminent violence and certain forms of bias-related criminal conduct may be proscribed consistent with the First Amendment, government generally may not impose regulations aimed at the content of expression. However objectionable certain opinions or ideas may be, the Constitution requires that such expression be constitutionally protected. As the Supreme Court consistently has recognized: "[t]he constitutional right of free expression is * * * intended to remove governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us * * * in the belief that no other approach would comport with the premise of individual dignity and choice upon which our political system rests." *Cohen* v. *California,* 403 U.S. 15, 24 (1971).

Because Article 4 mandates the suppression and criminalization of certain expression because of its content, and also implicates the freedom of association, we believe it is inconsistent with existing First Amendment principles. We thus have proposed a reservation indicating that the United States will not accept any obligation to restrict rights to free expression and association protected by the U.S. Constitution and laws. The text of this reservation is set forth at page 12 of the detailed legal analysis to which I referred earlier. Such a reservation will make clear that U.S. ratification of the Convention is informed by, and contingent upon, existing constitutional norms.

The second reservation we have proposed pertains to private conduct. We are concerned that certain provisions in the Convention might be interpreted as prohibiting conduct beyond the proper scope of governmental regulation under existing United States law. Our concerns are derived from the breadth of the definition of "racial discrimination" under Article 1(1); the obligation imposed on States Parties in Article 2(1)(d) to bring to an end all racial discrimination "by any persons, group or organization"; and the specific requirements of paragraphs 2(1) (c) and (d), Articles 3 and 5.

As explained in greater detail in our legal analysis, the Constitution and laws of the United States establish extensive protection against discrimination, including certain conduct by private actors. The "state action" requirement of the Fourteenth Amendment recognizes that in certain cases, conduct by private individuals is actionable if such conduct is "fairly attributable" to the State. *Lugar* v. *Edmonson* 457 U.S. 922, 937 (1982). Likewise, the federal civil rights statute, 42 U.S.C. §1983, reaches conduct by individuals acting "under color of" state law. *See West* v. *Atkins,* 487 U.S. 42 (1988). In addition, the Thirteenth Amendment's prohibition against slavery and involuntary servitude encompasses private, as well as governmental, action. Congress may regulate private conduct not only through the Thirteenth Amendment but also through its Article I Commerce and Spending powers, as it did in passing Title II and Title VII of the 1964 Civil Rights Act, which, respectively, prohibit private entities from discriminating in public accommodations and employment. Further discussion of U.S. law regarding private conduct is included in our legal analysis at pp. 12–15.

The government's ability to proscribe certain private conduct is, however, not unlimited. Our constitutional framework recognizes that individual freedom and protection from governmental interference are vital to a free and democratic society. For this reason, some private conduct is not actionable, even if discriminatory, provided no nexus exists between individual and governmental action.

Exactly how far the drafters of the Convention intended to sweep in regulating discriminatory conduct remains unclear. On the one hand, it could be argued that the reference to "public life" in the definition of "racial discrimination" in Article I limits the reach of the Convention to conduct involving some measure of governmental involvement or "state action." On the other hand, the negotiating history of the Convention is ambiguous on this point. Moreover, the Committee appears to have adopted an expansive view of the Convention, interpreting it to reach racial discrimination perpetuated by any person or group against another. We cannot be sure therefore that the term "public life" carries with it the same limits on governmental regulation as is contemplated under U.S. law. Some forms of private individual or organizational conduct that currently are outside the permissible scope of governmental regulation in this country could well become actionable under the Convention, thereby offending existing constitutional norms.

Because we wish to make clear that the obligations undertaken by the U.S. are limited by U.S. constitutional and statutory provisions, we have proposed a reservation indicating that "to the extent that the Convention calls for a broader regulation of private conduct, the United States does not accept any obligation * * * to enact legislation or take other measures under paragraph (1) of Article 2, subparagraphs (1) (c) and (d) of Article 2, Article 3 and Article 5 with respect to private conduct except as mandated by the Constitution and laws of the United States." The text of the reservation is included at pp. 14–15 in our legal analysis submitted to the Committee. We believe such a measure is prudent and will ensure that the U.S. does not embrace any obligation it cannot appropriately assume.

The third reservation we have submitted concerns submission to the jurisdiction of the International Court of Justice. Such a reservation parallels those taken to the Genocide and Torture Conventions. Although this Administration strongly supports the use of international dispute resolution mechanisms in appropriate cases, we believe it is prudent for the United States Government to retain the ability to decline to become involved in a case that may be brought by another country for frivolous or political reasons. In any case, the ICJ has played no practical role under this treaty; indeed, to date, no case has been brought to the ICJ under this Convention.

The primary mechanism for reviewing implementation of the Convention is through consideration of reports submitted by States Parties to the Convention on the Elimination of Racial Discrimination. The Committee also provides a mechanism for resolution of state-to-state complaints. The United States plans to submit to both mechanisms. Finally, there is ample opportunity in the United States to seek redress of alleged acts of discrimination.

In addition to these three reservations, we have proposed an understanding which expresses our view that with respect to implementation of the Convention, the Federal Government will have responsibility over matters under its jurisdiction and that otherwise implementation shall be the responsibility of state and local governments. This is to make clear that ratification does not preempt state and local antidiscrimination initiatives. The understanding also makes clear that where states and localities have jurisdiction over such measures, the Federal Government will ensure compliance. We adopted a similar provision in ratifying the Covenant on Civil and Political Rights in 1992 and believe such an understanding is appropriate here.

Finally, we have submitted a proposed declaration indicating that the Convention's provisions are not self-executing. Under Article VI, Clause 2 of the Constitution, duly ratified treaties become the supreme law of the land, equivalent to a federal statute. By making clear that this Convention is not self-executing, we ensure that it does not create a new or independently enforceable private cause of action in U.S. courts. We have proposed and the Senate has concurred in the same approach to previous human rights treaties, such as the U.N. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1990) and the International Covenant on Civil and Political Rights (1992).

As was the case with the earlier treaties, existing U.S. law provides extensive protection and remedies against racial discrimination sufficient to satisfy the requirements of the present Convention. In addition, federal, state and local laws already provide a comprehensive basis for challenging discriminatory statutes, regulations and other governmental actions in court, as well as certain forms of discriminatory conduct by private actors. There is thus no need for the establishment of additional causes of action to enforce the requirements of the Convention.

By adopting these proposed reservations, declarations and understandings, we signify the seriousness in which the United States accepts the obligations the Convention imposes. By being forthright about the legal constraints under which we operate, and specific about our obligations, as we interpret them, we make clear that we will meet the obligations we assume in a manner fully consistent with the Constitution and laws of the U.S. Since the major thrust of the Convention comports with U.S. law, the qualifications on U.S. ratification are few and do not undermine the central tenets or purposes of the Convention.

III

I wish also to point out that in our extensive analysis of the Convention's potential impact on our domestic law, we have identified other issues about which the Senate should be aware but which do not warrant inclusion in the Senate's resolution of advice or consent or in the instrument of ratification as specific reservations, understandings or reservations. These issues relate to Convention provisions regarding ethnic origin and descent; special measures, known as "affirmative action;" implementing legislation; provisions relating to discriminatory purpose and effect; territorial application; state to state complaints; individual petitions; and financial implications of ratification. Our analysis of each is set forth in the detailed legal memorandum which we hope will become part of the Committee's report on the Convention so that it will be readily accessible to interested parties.

Of these, perhaps the most noteworthy is Article 2(1)(c) of the Convention, which requires States Parties to "take effective measures to review governmental, national and local policies * * * which have the effect of creating or perpetuating racial discrimination." The provision also requires States Parties to "amend, rescind or nullify any laws and regulations" that have such effects.

The negotiating history of the Convention leaves unclear the precise scope of a State Party's obligation under Article 2(1)(c). We believe, however, that the provision does not require the invalidation of every race-neutral law, regulation or practice that causes some degree of adverse impact on racial groups. This conclusion is confirmed by the Committee's recently adopted General Recommendation XIV which states that "in seeking to determine whether an action has an effect contrary to the Convention, it will look to see whether that action has an unjustifiable disparate impact upon a group distinguished by race, colour, descent, or national origin."

The Committee's use of the term "unjustifiable disparate impact" indicates its view that the Convention reaches only those race-neutral practices that both create statistically significant racial disparities and that are unnecessary. This view is consistent with the standards for proving disparate impact under Title VII, the Title VI implementing regulations, and the Fair Housing Act, as well as with the requirements for proving a violation of the Equal Protection Clause or of the federal civil rights statutes.

In sum, Mr. Chairman and Members of the Committee, the International Convention on the Elimination of All Forms of Racial Discrimination embodies the antidiscrimination principles animating U.S. law. U.S. ratification of this Convention—long awaited by other countries—will be an important expression of our commitment to eradicate unlawful racial and ethnic discrimination and to ensure equal opportunity for all. By demonstrating our resolve to eliminate discrimination at home, we shall encourage respect for human rights and the rule of law abroad and, in so doing, join with other nations in building a fairer, more pluralistic, and ultimately more just, environment for everyone.

[Other material submitted by Mr. Harper may be found in committee files.]

The CHAIRMAN. And I must say that this committee, and certainly I, as its chairman, have the deepest regard for the way each of you have been doing your job.

I notice, Mr. Harper, you said that a duly-ratified Convention was equivalent to a Federal statute. I thought it was dominant over a Federal statute.

Mr. HARPER. No. It is equivalent to, Mr. Chairman. So that permits us, if we desire, as a matter of domestic law, to enact subsequent statutes which might have an effect upon the treaty domestically.

It would not have any effect on our international obligations, but we are able to by Federal statute to modify domestically any treaty undertaken.

The CHAIRMAN. If you entered a treaty and the treaty runs in one direction, domestic law runs in another, does the treaty not have priority?

Mr. HARPER. The treaty is equivalent only to a Federal statute. It is not equivalent to our——

The CHAIRMAN. It is equivalent. I thought it was superior.

Mr. HARPER. It is not superior of the Federal statute. No. It simply has the same status under our constitutional scheme. I should note that a duly ratified treaty will supercede prior inconsistent Federal law and itself can be displaced by subsequently enacted Federal legislation under the "last in time" principle.

The CHAIRMAN. In the past this committee and the Senate have approved ratification of another human rights treaty—the Covenant on Civil and Political Rights—with a proviso offered by Senator Helms, regarding sovereignty. Is the administration prepared to accept that proviso with respect to this Convention?

Mr. HARPER. We do not believe the proviso is absolutely necessary. But if there is a desire by the committee to have such a statement, it could be part of the resolution of advice and consent.

The CHAIRMAN. All right. I would also like to ask each one of you the question I asked Mr. Patrick. The Convention focuses on racial and ethnic discrimination in fields of "public affairs." How broad is the definition of public affairs?

Mr. Shattuck.

Mr. SHATTUCK. I am going to defer to my colleague Mr. Harper on the definitional aspects of the——

The CHAIRMAN. All right.

Mr. Harper.

Mr. HARPER. We have understood the matter of public affairs to relate to what we generally call in our jurisprudence "State action."

Therefore, generally speaking, we have seen that the treaty addresses public life. I think article 2 talks about public life, or words to that effect.

And our sense has been that, generally speaking, our law, with respect to forbidding racial discrimination, insofar as it affects or is affected by "State action," is consonant with the treaty.

The CHAIRMAN. Talk a little louder, please.

Mr. HARPER. Yes. We have seen that with respect to private action that it is that action taken by individuals that is not affected by any official act, that the treaty could be read to reach private action in all of its forms.

Now, as a matter of domestic law, we do reach private action. We do recognize, for example, under the 13th amendment that Congress has the power to eradicate the badges and incidents of slavery, even by private actors.

But we have been concerned not to go beyond what we think is mandated by the Constitution, and, therefore, we have taken a reservation making clear that in our judgment the treaty, the Convention, does not reach private action, except insofar as mandated by our Constitution and laws.

The CHAIRMAN. In other words it would not affect private clubs.

Mr. HARPER. It would not unless those private clubs are already affected by our domestic law.

The CHAIRMAN. The Convention establishes a Committee to review the progress of the different parties in implementing its provisions. How effective has the Committee been?

Mr. HARPER. I think the Committee so far has done what was expected, and that is to say, it has received reports and has considered the complaint mechanism that exists between states parties.

So far the Committee has not seen fit to establish the conciliation mechanism, which the Convention also contemplates. But there may be occasions in the future when that occurs.

Our general sense is, though, that to make the Committee even more fully effective, we are wise to join. And since January of this year, since the Committee is funded by the general dues of the U.N., we are paying for the Committee. So we may as well join it and help it work better.

The CHAIRMAN. I believe you are proposing a reservation related to compulsory submission of disputes to the ICJ. There are those, and I am amongst them, who would argue that this would undermine the seriousness of the U.S. commitment to international mechanisms in resolving disputes. What would be your response to that argument?

Mr. HARPER. I think it does not, Mr. Chairman. We have recognized that the International Court of Justice is not necessary to make sure that domestically we are in accord with the treaty's obligations.

We recognize further that the treaty does not improve our domestic law. Our domestic law, if anything, exceeds the expectations of the treaty.

So in our judgment, we provide within the United States a full panoply of opportunities for enforcing domestic law, which, as I say, generally exceeds the requirements of the treaty.

That being the case, the necessity for having a foreign country bring the United States before the International Court of Justice in order to get an adjudication strikes us as unnecessary.

We have agreed that we shall participate, if ratified, in the Convention's provision for the Committee and for the conciliation dispute mechanism.

We think those two are sufficient to assure that internationally we are comporting with the treaty's obligations. We do not think the addition of the ICJ makes any real difference.

I might add further that the ICJ has never had a case under this Convention, even though it was open for signature in 1966.

Mr. SHATTUCK. Mr. Chairman, I might just point out one technical aspect, to amplify the definitive comment that my colleague has given.

And that is that the reservation that is taken here does not preclude the prospect that the United States might, in fact, accede to the jurisdiction of the ICJ in particular matters.

This is not by any means an exclusion of ICJ jurisdiction for all purposes, but it would be up to the United States to decide in what instances it wanted to accept that jurisdiction.

The CHAIRMAN. My recollection is that we refused jurisdiction in connection with the mining in Central America. But has there been any case of our refusing jurisdiction since that time?

Mr. HARPER. No, there has not been. And, indeed, we have pending in the International Court of Justice, several cases at the present moment.

The CHAIRMAN. That we accept jurisdiction?

Mr. HARPER. With respect to which we have not challenged jurisdiction. There is, for example, a case brought by Iran against the United States involving the air bus that was downed some years ago.

There is another case brought by Iran in the International Court of Justice involving the oil platforms which were destroyed by our forces, because they were attacking our and other neutral shipping in the gulf.

The CHAIRMAN. So it would be a correct statement to say that we have not been affected by this for at least 20 years.

Mr. HARPER. Well, we have—since 1982, I guess, was the Nicaragua case.

The CHAIRMAN. Yes. Since then.

Well, I thank you both very much for being with us, and giving us this testimony, which will be very useful, and I excuse you.

Mr. HARPER. Thank you, Mr. Chairman.

Mr. SHATTUCK. Thank you, Mr. Chairman.

The CHAIRMAN. I would ask now—without objection, I will insert in the record a letter from the Department of State, from Mr. Talbott, Acting Secretary, with official views laid out at some length from the department.

[The information referred to follows:]

DEPARTMENT OF STATE,
WASHINGTON, DC,
April 26, 1994.

HON. CLAIBORNE PELL,
Chairman, Committee on Foreign Relations, U.S. Senate, Washington, DC

DEAR MR. CHAIRMAN: As you are aware, the Clinton Administration has indicated its strong support for the early ratification of the International Convention on the Elimination of All Forms of Racial Discrimination, which was signed by the United States in 1966 and transmitted to the Senate for its advice and consent to ratification in 1978. Apart from a hearing before the Senate Foreign Relations Committee in 1979, no further action has been taken with respect to this important human rights treaty. I am writing on behalf of the President to urge the Senate Foreign Relations Committee to give its prompt attention to and approval of this Convention.

Contemporary U.S. domestic law provides strong protections against racial discrimination in all fields of public endeavor, as well as effective methods of redress and recourse for those who despite these protections nonetheless become victims of discriminatory acts or practices. Accordingly, as indicated in the enclosed analysis, subject to a few necessary reservations and understandings, the requirements of this treaty are consistent with existing U.S. law. Early ratification by the United States would, however, serve to underscore our national commitment to the international promotion of the fundamental values and principles reflected in this widely-accepted treaty.

Even more importantly, U.S. ratification would enhance our ability to take effective steps within the international community to confront and combat the increasingly destructive discrimination which occurs against minorities around the world on national, racial and ethnic grounds. Ethnic animosity and hatred have become a tragically common feature of the post-Cold War political landscape, one which has strained the abilities of existing institutions to contain and control and which in-

creasingly calls for new approaches and new solutions to what are in many cases centuries-old animosities.

Our own national struggle to overcome a history of racial discrimination, while by no means finished, has given us a measure of perspective and insight on various ways in which these issues can be successfully addressed within the content of an open, pluralistic democracy. These are lessons and experiences which the United States can usefully share with other nations which are now having to come to terms with their own long-standing racial, ethnic and nationalistic divisions, many of which have deep-seated historical roots but have been hidden beneath politically repressive regimes throughout most of the twentieth century. Ratification of the Convention, and active participation in its Committee on the Elimination of All Forms of Racial Discrimination which serves to interpret and monitor compliance with its provisions, will permit the United States to play an even more active and effective role in the struggle against racial discrimination throughout the world.

The President has asked the Department of State to work closely with you and the Committee in a common and cooperative effort aimed at the early approval of this Convention. In this spirit, I am enclosing a short list of proposed reservations, understandings and declarations which the Administration believes should form the legal basis on which the United States will become party to this treaty.

To assist the Committee in its consideration of these proposals, I am also enclosing a memorandum analyzing the requirements of the Convention against relevant provisions of current U.S. law and explaining the reasoning behind each of the reservations, understandings and declarations.

I urge the Senate to give its advice and consent to ratification of this important human rights treaty.

Sincerely,

STROBE TALBOTT,
Acting Secretary.

Enclosures

ANALYSIS OF PROVISIONS AND EXPLANATION FOR PROPOSED RESERVATIONS, UNDERSTANDINGS AND DECLARATIONS

The Convention on the Elimination of All Forms of Racial Discrimination was adopted unanimously by the United Nations General Assembly on December 21, 1965 and entered into force on January 4, 1969. Currently more than 135 States are party to the Convention, making it one of the most widely adhered-to human rights treaties in the international community. The United States signed the Convention on September 28, 1966. It was transmitted to the Senate for advice and consent to ratification in 1978. It has remained before the Senate since that time.

I. OVERVIEW OF THE CONVENTION

The Convention is designed to forbid racial and ethnic discrimination in all fields of public life. It requires all States Party to pursue a policy of eliminating racial discrimination," which is defined in Article 1(1) as:

> "any distinction, exclusion, restriction or preference based on race, color, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life."

Broad as this definition is, however, it is not open-ended. As specified in Article 1(2), the Convention does not apply to distinctions, exclusions, restrictions or preferences made between citizens and non-citizens, nor (by virtue of Article 1(3)) does it affect "in any way" legal provisions concerning nationality, citizenship or naturalization, provided that such provisions do not discriminate against any particular nationality. Moreover, under Article 1(4), an exception is made for "special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection," i.e., what have come to be known in the United States as "affirmative action" programs.

Consistent with the overall objective of the Convention, Article 2 provides generally that States Parties must neither practice nor encourage racial discrimination. In particular, States Parties are required under Article 2(1) to take a series of specified steps or measures to eliminate racial discrimination within their jurisdictions, including (a) to ensure that all public authorities and institutions act in conformity with that basic obligation, (b) not to sponsor, defend or support racial discrimination by any persons or organizations, (c) to review governmental policies and to amend, rescind or nullify discriminatory laws and regulations at all levels of political orga-

nization, (d) to bring to an end, by all appropriate means, racial discrimination by "any persons, group or organization," and (e) to encourage, where appropriate, integrationist multi-racial organizations and movements.

When circumstances so warrant, States Parties are obliged under Article 2(2) to take "special and concrete measures" to guarantee certain racial groups or individuals belonging to them the full and equal enjoyment of human rights and fundamental freedoms.

Under Article 3, States Parties condemn racial segregation and *apartheid* and undertake to prevent, prohibit and eradicate all practices of this nature in territories under their jurisdiction.

Article 4 requires States Parties to condemn propaganda and organizations based on racial hatred or superiority. Specifically, this article requires (a) criminalizing the dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, and acts of violence or incitement to such acts against any race or group of persons of another color or ethnic origin, (b) prohibiting organizations and propaganda which promote and incite racial discrimination, and (c) forbidding public authorities or institutions, national or local, from promoting or inciting racial discrimination.

Under Article 5, States Parties undertake to guarantee the right of everyone, without distinction as to race, color or national or ethnic origin, to equality before the law in the enjoyment, among others, of the rights to equal treatment before the courts, security of the person and protection against violence and bodily harm, political rights including universal and equal suffrage, freedom of movement and residence, peaceful assembly and association, thought, conscience, religion, opinion and expression, the right to nationality, marriage, to own and inherit property, and to work, to form and join unions, to housing, medical care, education, cultural activities, and access to public facilities.

Article 6 requires States Parties to assure everyone within their jurisdiction effective protection and remedies against acts of discrimination which violate human rights and fundamental freedoms contrary to this Convention, including the right to seek just and adequate reparation or satisfaction for any damage suffered as a result of such discrimination.

Finally, under Article 7 States Parties commit to adopting immediate and effective measures (particularly in the fields of teaching, education, culture and information) with a view to combating prejudices which lead to racial discrimination and to promoting understanding, tolerance and friendship among nations, racial or ethnical groups.

In Articles 8–16, the Convention established a Committee on the Elimination of Racial Discrimination (the Committee), an autonomous body of 18 experts of high moral standing and acknowledged impartiality who are elected by States Parties to four year terms. The basic function of the Committee is to consider detailed reports from States Parties on the legislative, judicial, administrative or other measures they have adopted or which give effect to the provisions of the Convention. The first such report is due within one year of the entry of the Convention into force for the State concerned; supplementary reports are due thereafter every two years. The Committee also submits an annual report to the UN General Assembly.

The Committee generally meets twice a year, usually in New York or Geneva. Although it is not a court, it may hear complaints by one State Party against another concerning non-compliance with Convention requirements, Such disputes, if not settled by mutual agreement, may be resolved by the Committee or, in its discretion, referred to a non-binding conciliation commission. To date, no such disputes have been brought.

States Parties may, on an optional basis, also recognize the competence of the Committee to consider communications from individuals or groups claiming to be victims of a violation by that State of any of the rights set forth in the Convention. A State which makes such a declaration may also establish a national body to receive and consider such petitions from individuals within its jurisdiction on an initial basis; petitioners who fail to receive satisfaction from such a body within six months may communicate directly with the Committee.

Both mechanisms described above are non-binding. The Convention contains no provision for the referral of either state-to-state complaints or individual petitions to the International Court of Justice, either directly or from the Committee. Article 22 of the Convention does provide, however, that disputes between two or more Parties with respect to the interpretation or application of the Convention, which are not settled by negotiation or other methods, may be submitted to the ICJ at the request of either of them.

II. RELATIONSHIP TO U.S. LAW

Existing U.S. constitutional and statutory law and practice provide broad and effective protections against and remedies for discrimination on the basis of race, color, ethnicity or national origin for all persons within the United States or subject to its jurisdiction. In particular, the specific requirements of the Convention find ample counterparts in our federal law, so that no new implementing legislation is considered necessary to give effect to the Convention.

a. U.S. Constitution

The constitutional protections against racial discrimination are contained in the Thirteenth, Fourteenth and Fifteenth Amendments, all of which were ratified in a five-year period following the conclusion of the Civil War in 1865, and in the Fifth Amendment, which since 1954 has been construed to forbid the federal government from engaging in racial discrimination.

(1) *Thirteenth Amendment.*—The Thirteenth Amendment abolished slavery. Section 2 of the Amendment authorizes Congress to enforce the prohibition of slavery through "appropriate legislation." As set forth below, a few civil rights statutes have been enacted pursuant to Section 2 of the Thirteenth Amendment. It is clear that the Thirteenth Amendment and legislation implementing its commands are consistent with the Convention.

(2) *Fifth and Fourteenth Amendments.*—The part of the Fourteenth Amendment that speaks to racial discrimination is the Equal Protection Clause, which provides that "[n]o State shall deny to any person within its jurisdiction the equal protection of the laws." Equal protection strictures apply to the federal government through the Due Process Clause of the Fifth Amendment. *See Bolling* v. *Sharpe,* 347 U.S. 497 (1954).

The Supreme Court has interpreted the Equal Protection Clause as a "direction that all persons similarly situated should be treated alike." *Cleburne* v. *Cleburne Living Center, Inc.,* 473 U.S. 432, 439 (1985). In essence, it precludes governments from adopting unjustifiable legal distinctions between groups of people. *See Plyler* v. *Doe,* 457 U.S. 202, 216–219 (1982). Over time, the Supreme Court has made plain that distinctions based on race or national origin are inherently suspect, and thus are rarely justifiable. *McLaughlin* v. *Florida,* 379 U.S. 184, 192 (1964). When challenged in court, such distinctions are subject to "strict scrutiny," the most exacting standard of constitutional review. Under strict scrutiny, a classification violates the Equal Protection Clause unless it is necessary to promote a "compelling state interest" and is "narrowly tailored" to achieve that interest. *Palmore* v. *Sidotti,* 466 U.S. 429, 432 (1984). In practice, most racial or ethnic classifications fail to satisfy those standards. *Bernal* v. *Fainter,* 467 U.S. 216, 219 n.6 (1984). Moreover, strict scrutiny applies not only to laws that specifically categorize individuals on the basis of race or ethnicity, but also to ostensibly neutral laws that are enforced only against certain racial or ethnic groups. *See Personnel Administrator* v. *Feeney,* 442 U.S. 256, 277 (1979) (citing *Yick Wo* v. *Hopkins,* 118 U.S. 356 (1886)).

Even where racial or ethnic classifications are not at issue, strict scrutiny applies to legal distinctions that interfere with the exercise of certain fundamental rights that the Supreme Court has determined are subject to equal protection guarantees. Under this strand of equal protection doctrine, the Supreme Court has invalidated discriminatory measures in the areas of voting, *Harper* v. *Virginia State Board of Education,* 383 U.S. 663 (1966), inter-state and foreign travel, *Aptheker* v. *Secretary of State,* 378 U.S. 500 (1964) and access to court systems, *Griffin* v. *Illinois,* 351 U.S. 12 (1956).

In short, the Equal Protection Clause, as interpreted in the Supreme Court's suspect classification and fundamental rights jurisprudence, is consistent with the enumerated guarantees of Article 5 of the Convention.

(3) *Fifteenth Amendment.*—The last of the post-Civil War era Amendments, the Fifteenth Amendment provides that the right to vote "shall not be denied or abridged by the United States or by any state on account of race, color, or previous condition of servitude." This is consistent with the voting guarantee that is among the rights enumerated in Article 5 of the Convention.

b. Federal Civil Rights Legislation

Since the Civil War, Congress has adopted a number of statutes designed to supplement and expand upon the prohibitions of the Thirteenth, Fourteenth and Fifteenth Amendments in an effort to eliminate racial discrimination in a broad range of governmental, economic and social activity.

(1) *The 1866 and 1871 Civil Rights Acts.*—Now codified at 42 U.S.C. §§ 1981–85, these Reconstruction-era statutes prohibit racial discrimination in the making and enforcement of private contracts (including employment, education, health care and

recreational facilities) (§ 1981) and in the inheritance, purchase, sale or lease of real and personal property (§ 1982); they also provide causes of action for civil damages against anyone who under "color of law" subjects another to unlawful discrimination (§ 1983), as well as those who conspire to deprive individuals of their federal rights (§ 1985).

(2) *The Civil Rights Act of 1964.*—Often described as the most important civil rights legislation in U.S. law, this statute prohibits discriminatory acts involving public accommodation, federally-funded programs and private employment.

(a) Title II of the Act, codified at 42 U.S.C. § 2000a, forbids discrimination on the basis of "race, color, religion or national origin" in places of public accommodation, including dining and entertainment facilities affecting interstate commerce and gasoline stations serving interstate commerce. While this statute has in practice been broadly applied (for example, to cover theaters, bars and golf courses), it contains an exception for private clubs and other establishments not in fact open to the public.

(b) Title VI, codified at 42 U.S.C. § 2000d *et seq.*, provides that no person in the United States shall be excluded from participation in, or denied the benefits of, any federally-funded or assisted program or activity on account of race, color or national origin. This provision has had a particularly salutary effect in the continuing efforts to eliminate *de jure* school segregation and its vestiges as well as housing segregation.

(c) Title VII, codified at 42 U.S.C. § 2000e *et seq.*, is the primary federal statute addressing discrimination in employment. Subject to certain exceptions, it prohibits discrimination on the basis of race, color and national origin (among other factors) in hiring, compensation, conditions of employment and dismissals by employers, labor organizations and employment agencies affecting commerce. Complaints under this statute are initially filed with the Equal Employment Opportunity Commission. In 1991, Congress amended Title VII to provide additional remedies for intentional discrimination in the workplace.

(3) *The Voting Rights Act of 1965.*—Among the most fundamental rights in any democratic system is the right to participate freely in the government of one's country without discrimination on the basis of race, color or national origin. In the United States, the Fifteenth Amendment has prohibited denial of the right to vote on the basis of race, color or previous condition of servitude since 1870, and the Twenty-Fourth Amendment has precluded such other potentially discriminatory practices as poll taxes and literacy tests since 1964. In 1965, Congress supplemented these guarantees by adopting the Voting Rights Act, 42 U.S.C. §§ 1973–73c, which forbids states and their political subdivisions from using any voting qualification, standard, practice or procedure to deny or abridge the right of any U.S. citizen to vote on account of race or color or because of membership in a language minority group. As interpreted, this statute also reaches discrimination on the basis of ethnic or national origin. It also requires that bilingual voting information be made available where more than 5% of the population or 10,000 individuals speak a language other than English.

(4) *The Fair Housing Act.*—This statute, originally enacted as Title VIII of the Civil Rights Act of 1968 and amended by the Fair Housing Amendments Act of 1988, is codified at 42 U.S.C. §§ 3601–19. It prohibits discrimination on the grounds of, *inter alia,* race, color, religion, or national origin in the sale or rental of housing as well as in real estate related transactions (i.e., lending, insurance, and appraisal practices) and brokerage services. Exceptions are provided for private clubs, single family dwellings and owner-occupied boarding houses with no more than three other family units, except when the owner uses the services of real estate brokers or others.

c. State Anti-Discrimination Measures

Most of the states, and many large cities, have adopted their own statutory and administrative schemes for protecting individuals from discrimination in fields actively regulated by state and local governments. For example, state constitutions and statutes typically protect individuals from discrimination in housing, employment, public accommodations, government contracting, credit transactions and education. As a result, a particular discriminatory act might well violate federal, state and local law—each with their own sanctions. To a varying extent, states may provide protections which differ from or exceed the minimum requirements of federal law. Where such protections exist, state or municipal law also provides judicial or administrative remedies for victims of discrimination.

d. Enforcement and Remedial Mechanisms

Existing U.S. law provides extensive remedies and avenues for seeking redress for acts of discrimination. A person claiming to have been denied a constitutionally protected right, for example under the Due Process or Equal Protection Clauses of the Fifth or Fourteenth Amendments, may assert that right directly in state or federal court. The federal Civil Rights Acts typically provide statutory remedies; for example, under the 1871 Act, 42 U.S.C. §1983, a person complaining of discrimination resulting from actions taken under color of state law may seek civil damages and injunctive relief against the responsible state official. Federal officials may be sued for damages directly under provisions of the Constitution. *See, e.g., Bivens* v. *Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971) (violations of Fourth Amendment protections against unreasonable searches and seizures by federal officers give rise to a federal cause of action for damages).

The Civil Rights Division of the Department of Justice has principal responsibility for the effective enforcement of federal civil rights laws, in particular for the Civil Rights Acts of 1964 and 1991, the Voting Rights Act of 1965, and Executive Order No. 12250 (which requires all executive departments and agencies to eliminate racial, religious and sex discrimination). Primary responsibility for administration of the Fair Housing Act is vested in the Secretary of Housing and Urban Development. Where Congress has so provided, the federal government may itself bring civil actions to enjoin acts or patterns of conduct that violate constitutional rights, and in some instances is empowered to prosecute those who use force or threat of force to violate a person's rights to non-discrimination.

The Equal Employment Opportunity Commission, an independent agency within the executive branch established by the Civil Rights Act of 1964, has oversight and compliance responsibilities concerning the elimination of discrimination based *inter alia* on race, color and national origin by private employers in all aspects of the employment relationship. The U.S. Commission on Civil Rights collects information on discrimination or denials of equal protection of the laws because of race, color, and national origin, evaluates federal laws, and makes recommendations to the President and the Congress concerning the effectiveness of governmental equal opportunity and civil rights programs.

Other federal departments and agencies also have enforcement responsibilities. For example, within the Department of Education, the Office for Civil Rights is charged with administering and enforcing the civil rights laws related to education, including desegregation of the schools. The Assistant Secretary for Fair Housing and Equal Opportunity within the Department of Housing and Urban Development administers the laws prohibiting discrimination in public and private housing and ensures equal opportunity in all community development programs. The Office of Civil Rights within the Department of Health and Human Services administers laws prohibiting discrimination in federally-assisted health and human services programs. Authorities within the Department of Labor administer programs dedicated to equality in government contracting.

III. PROPOSED RESERVATIONS, UNDERSTANDINGS AND DECLARATIONS

While U.S. law and policy are broadly consonant with the requirements of the Convention, the concurrence is not exact in all respects. The principal points of difference concern (a) the Convention's prohibitions concerning advocacy and incitement, which to a certain extent conflict with constitutional guarantees of free expression and association, (b) the Convention's requirements to restrict the activities of private persons and non-governmental entities, which in some instances lie beyond the reach of current U.S. law, and (c) the express extension of the Convention's restrictions to all levels of political organization, which implicates the delicate relationship between the state and federal governments in the United States systems. While these differences are mostly ones of approach rather than substance, they nonetheless require clarification in the context of U.S. ratification of the Convention.

In making these clarifications, the Administration notes in particular the provisions of Article 20, which preclude reservations which are "incompatible with the object and purpose of the Convention" or "the effect of which would inhibit the operation of any of the bodies established by the Convention." While the prohibition against incompatibility is well-established in international treaty law, paragraph 2 of this Article also provides that "[a] reservation shall be considered incompatible or inhibitive if at least two-thirds of the States Parties to this Convention object to it." This provision is clearly intended to protect the integrity of the Convention as a uniform and widely-adopted international standard against racial discrimination, to which States Parties conform their domestic law to the greatest possible extent. The United States supports this goal. It is the considered view of the Administration

that none of the following proposals is incompatible with the object and purpose of the Convention or is likely to draw serious objections from other States Parties.

a. Freedom of Speech, Expression and Association

As indicated above, Article 4 requires States Parties to "condemn all propaganda and all organizations which are based on ideas or theories of superiority of one race or group of persons of one colour or ethnic origin, or which attempt to justify or promote racial hatred and discrimination in any form." States Parties are further required to take immediate and positive measures to "eradicate all incitement to, or acts of, such discrimination" *inter alia* by (a) punishing the dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, and acts of violence or incitement to acts of violence, as well as the provision of assistance to racist activities, including financing; (b) prohibiting organizations and activities which promote and incite racial discrimination, including participation in such organizations and activities; and (c) preventing public authorities or institutions, whether national or local, from promoting or inciting racial discrimination.

Article 7 imposes an undertaking on States Parties to take measures to combat prejudice and promote tolerance in the fields of teaching, education, cultural and training.

These provisions reflect the view that penalizing and prohibiting the dissemination of ideas based on racial superiority are central elements in the international struggle against racial discrimination.

As a matter of national policy, the United States Government has long condemned racial discrimination (including the heinous practice of *apartheid),* and it engages in many activities both to combat prejudices leading to racial discrimination and to promote tolerance, understanding and friendship among national, racial and ethnic groups. Such programs include those under the authority of Title VI of the Civil Rights Act, the Fair Housing Act, the Bilingual Education Act, the Mutual Educational and Cultural Exchange Act of 1961, the International Education Act (Title VI of the HEA of 1965), and the National Foundation on the Arts and the Humanities Act of 1965. Further, the Hate Crimes Statistics Act mandates collection by the Justice Department of data on crimes motivated among other things by race.

The government's ability to restrict or prohibit the expression or advocacy of certain ideas, however objectionable, is sharply curtailed by the First Amendment to the Constitution. Under the First Amendment, opinions and speech are protected without regard to content. Certain types of speech, intended and likely to cause imminent violence, may constitutionally be restricted, so long as the restriction is not undertaken with regard to the speech's content. For example, several federal statutes punish "hate crimes," i.e. acts of violence or intimidation motivated by racial, ethnic or religious hatred and intended to interfere with the participation of individuals in certain activities such as employment, housing, public accommodation, use of public facilities, and the free exercise of religion. See 18 U.S.C. §§ 241, 245, 247; 42 U.S.C. § 3631. An increasing number of state statutes are similarly addressed to hate crimes, and while they too are constrained by constitutional protections, *see R.A.V.* v. *City of St. Paul,* 112 S.Ct. 2538 (1992), the Supreme Court has recently determined that bias-inspired criminal conduct may be singled out for especially severe punishment under state law. *Wisconsin* v. *Mitchell,* 113 S.Ct. 2194 (1993). Nonetheless, in most circumstances, speech itself is protected regardless of its content.

The requirements of Article 4 of the Convention are thus inconsistent with the First Amendment. During the drafting of Article 4, the U.S. delegation expressly recognized that it posed First Amendment difficulties, and upon signing the Convention in 1966, the United States made a declaration to the effect that it would not accept any requirement thereunder to adopt legislation or take other actions incompatible with the U.S. Constitution. A number of other States Parties have conditioned their acceptance of Article 4 by reference to the need to protect the freedoms of opinion, expression, association and assembly recognized in the Universal Declaration of Human Rights. However, the Committee has given a broad interpretation to Article 4, in particular emphasizing in General Recommendations I (1972) and VII (1985) the mandatory requirements of Article 4 (a) and (b), and its view that the prohibition against the dissemination of all ideas based on racial superiority or hatred is compatible with the rights of freedom of opinion and expression.

In becoming party to the International Covenant on Civil and Political Rights in 1992, the United States faced a similar problem with respect to Article 20 of that treaty. In part because the Human Rights Committee has adopted a similarly broad interpretation of that article (see General Comment 11 (1983)), the United States accordingly entered a reservation intended to make clear that the United States cannot and will not accept obligations which are inconsistent with its own constitu-

tional protections of free speech, expression and association. A similar reservation is therefore proposed with respect to the current Convention.

Proposed Reservation: "The Constitution and laws of the United States contain extensive protections of individual freedom of speech, expression and association. Accordingly, the United States does not accept any obligation under this Convention, in particular under Articles 4 and 7, to restrict those rights, through the adoption of legislation or any other measures, to the extent that they are protected by the Constitution and laws of the United States."

b. Private Conduct

Given the breadth of the definition of "racial discrimination" under Article 1(1), the obligation imposed on States Parties in Article 2(1)(d) to bring to an end all racial discrimination "by any persons, group or organization," and the specific requirements of paragraphs 2(1) (c) and (d) as well as Articles 3 and 5, the Convention may be viewed as imposing a requirement on the government to take action to prohibit and punish purely private conduct of a nature generally held to lie beyond the proper scope of governmental regulation under current U.S. law.

Since the time of the *Civil Rights Cases*, 109 U.S. 3 (1883), it has been clear that the Fourteenth Amendment prohibits "[s]tate action of a particular character" and that, by contrast, "[i]ndividual invasion of individual rights is not the subject-matter of the amendment." *Id.*. at 11. The "state action" requirement of the Equal Protection Clause reflects a traditional recognition of the need to preserve personal freedom by circumscribing the reach of governmental intervention and regulation, even in situations where that freedom is exercised in a discriminatory manner.

In determining whether state action for Fourteenth Amendment purposes is present in a given case, the critical inquiry is whether the conduct of a private party is "fairly attributable" to the state. *Lugar* v. *Edmonson*, 457 U.S. 922, 937 (1982). Under that test, governmental involvement with private parties is often insufficient to trigger a finding of state action. For example, in and of itself, government licensing and regulation of private entities is not state action. *See Moose Lodge No. 107* v. *Irvins*, 407 U.S. 163 (1972) (licensing); *Jackson* v. *Metropolitan Edison*, 419 U.S. 345 (1974) (regulation). That is also the case with government contracting. *See Blum* v. *Yaretsky*, 457 U.S. 991 (1982). However, state employees acting under color of law are generally "state actors." *West* v. Atkins, 487 U.S. 42 (1988). In addition, the Supreme Court has held the following constitutes state action: the private performance of "public functions," *Marsh* v. *Alabama*, 326 U.S. 501 (1946); judicial enforcement of private discriminatory arrangements, *Shelley* v. *Kraemer*, 334 U.S. 1 (1948); certain forms of governmental assistance or subsidies to private parties, *Norwood* v. *Harrison*, 413 U.S. 455 (1973); and state encouragement of discrimination by private parties, *Reitman* v. *Mulkey*, 387 U.S. 369 (1967).

Furthermore, the Thirteenth Amendment's prohibition against slavery and involuntary servitude does encompass both governmental and private action. See *Civil Rights Cases*, 109 U.S. 3, 20 (1883). The Supreme Court has held that Congress may regulate private conduct under §2 of the Thirteenth Amendment, which provides that "Congress shall have the power to enforce this article by appropriate legislation." *Jones* v. *Alfred H. Mayer Co.*, 392 U.S. 409 (1968). Such power includes determining what constitutes the "badges and incidents of slavery and the authority to translate that determination into effective legislation." *Id.* at 440. *See also United States* v. *Kozminski*, 487 U.S. 931, 942 (1988) (discussing Thirteenth Amendment right to be free from involuntary servitude).

Although *Jones* could be read as authorizing Congress to regulate a broad array of harms on the ground that they were a form of servitude and slavery, the Court has had no occasion to define the outer limits of *Jones*. The Court has intimated, however, that "some private discrimination * * * in certain circumstances" is subject to legislation under §2 of the Thirteenth Amendment. See *Norwood* v. *Harrison*, 413 U.S. 455, 470 (1973). The Reconstruction-era civil rights statutes, which are predicated on the Thirteenth Amendment, reach private action. For instance, under the Reconstruction-era civil rights statutes discussed above, §1982 has been used to prohibit private actors from engaging in racial discrimination in a variety of activities, including the sale or rental of private property, *see Jones, supra*, 392 U.S. at 413; the assignment of a lease, *see Sullivan* v. *Little Hunting Park, Inc.*, 396 U.S. 229 (1969); and the grant of membership in a community swimming pool, *see Tillman* v. *Wheaton-Haven Recreation Ass'n. Inc.*, 410 U.S. 431 (1973). Racial restrictions in the making and enforcement of private contracts are prohibited by §1981, *see Patterson* v. *McLean Credit Union*, 491 U.S. 164, 272 (1989); *see also Runyon* v. *McCrary*, 427 U.S. 160 (1976) (reaching refusal of private school to admit black students). Finally, §1985(3) has been applied to some private conspiracies. Compare *Bray* v. *Alexandria Women's Health Clinic*—U.S.—(1993) (demonstrations against

abortions clinics not within scope of statute) with *Griffin* v. *Breckenridge*, 403 U.S. 88 (1971) (conspiracy to deprive blacks of right of interstate travel within reach of statute).

In addition to the Thirteenth Amendment, Congress may regulate private conduct through the Commerce and Spending powers that it possesses under Article I of the Constitution. For example, it was under the Commerce Clause that Congress passed Title II and Title VII of the 1964 Civil Rights Act, which prohibit private entities from discriminating in public accommodations and employment. *Katzenbach* v. *McClung*, 379 U.S. 294 (1964). The Fair Housing Act is similarly grounded in the Commerce Clause. And it was under its Spending Power as well as its authority under Section 5 of the Fourteenth Amendment that Congress passed Title VI of the 1964 Civil Rights Act, which prohibits discrimination by public and private institutions that receive federal funds. *See Lau* v. *Nichols*, 414 U.S. 563 (1974).

Arguably, the reference to "public life" in the definition of "racial discrimination" in Article 1(1) of the present Convention might be read to limit the reach of its prohibitions to actions and conduct involving some measure of governmental involvement or "state action." The negotiating history of the Convention is far from clear on this point, however, and it is certainly not possible to say with assurance that the term "public life" as contemplated by the drafters is synonymous with the permissible sphere of governmental regulation under U.S. law. Moreover, the Committee appears to have taken an expansive view in this regard, finding in the Convention a prohibition against racial discrimination perpetuated by any person or group against another. Accordingly, some forms of private individual or organizational conduct which are not now subject to governmental regulation could well be found within the sphere of "public life" as that term is interpreted under the Convention.

Accordingly, it is appropriate to indicate clearly, through a formal reservation, that U.S. undertakings in this regard are limited by the reach of constitutional and statutory protections under U.S. law as they may exist at any given time.

Proposed Reservation: "The Constitution and laws of the United States establish extensive protections against discrimination, reaching significant areas of non-governmental activity. Individual privacy and freedom from governmental interference in private conduct, however, are also recognized as among the fundamental values which shape our free and democratic society. The United States understands that the identification of the rights protected under the Convention by reference in Article 1 to fields of 'public life' reflects a similar distinction between spheres of public conduct that are customarily the subject of governmental regulation, and spheres of private conduct that are not. To the extent, however, that the Convention calls for a broader regulation of private conduct, the United States does not accept any obligation under this Convention to enact legislation or take other measures under paragraph (1) of Article 2, subparagraphs (1) (c) and (d) of Article 2, Article 3 and Article 5 with respect to private conduct except as mandated by the Constitution and laws of the United States."

c. *Federalism*

Given its constitutional roots and its embodiment in the extensive statutory provisions enacted by Congress over the decades, federal antidiscrimination law is pervasive and reaches the state and local levels of government as well as the federal. It provides the basis for broad regulation on racially-discriminatory conduct at the private level as well. Nonetheless, it is conceptually limited to the enforcement of constitutional provisions or statutes otherwise based on powers delegated to the Congress, for example through the Commerce Clause. There remains to the constituent states and local governments a fairly substantial range of action within which to regulate or prohibit discriminatory actions beyond the reach of federal law. As indicated above, in many instances the states and local governments have exercised their inherent authority by adopting statutes and administrative regulations providing powerful and effective protections against, and remedies for, discrimination based on race, color, ethnicity and national origin.

There is no disposition to preempt these state and local initiatives or to federalize the entire range of anti-discriminatory actions through the exercise of the constitutional treaty power. Nor is it necessary to do so in order to ensure that the fundamental requirements of the Convention are respected and complied with at all levels of government within the United States. In some areas, it would be inappropriate to do so. For example, state and local communities have always taken the lead in public education. Federal control over education, particularly in the areas of curricula, administration, programs of instruction, and the selection and content of library resources, textbooks, and instructional materials, is expressly limited by

statute. Measures to ensure fulfillment of the Convention in these areas will include activities that conform to these provisions.

Furthermore, there is no need for implementing legislation providing the Federal Government with a cause of action against states to ensure that states fulfill the obligations of the Convention; subject to the constraints imposed by our federal system, the Federal Government already has the authority under the Constitution and the civil rights laws to take action against states to enforce the matters covered by the Convention.

In ratifying the Covenant on Civil and Political Rights in 1992, the United States addressed the federalism issue through adoption of an interpretive understanding, the effect of which was to clarify that the United States will carry out its obligations in a manner consistent with the federal nature of its form of government. A similar understanding is recommended with respect to the current Convention.

Proposed Understanding: "The United States understands that this Convention shall be implemented by the Federal Government to the extent that it exercises jurisdiction over the matters covered therein, and otherwise by the state and local governments. To the extent that state and local governments exercise jurisdiction over such matters, the Federal Government shall, as necessary, take appropriate measures to ensure the fulfillment of this Convention."

d. Non-Self-Executing

Under Article VI, cl. 2, of the Constitution, duly ratified treaties become the supreme law of the land, equivalent to a federal statute. Its provisions are clearly intended to impose immediate obligations upon the constituent States. In considering ratification of previous human rights treaties, in particular the U.N. Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment (1990) and the international Covenant on Civil and Political Rights (1992), both the Executive Branch and the Senate have considered it prudent to declare those treaties to be non-self-executing. The intent is to clarify that the treaty will not create a new or independently enforceable private cause of action in U.S. courts.

As was the case with the prior treaties, existing U.S. law provides extensive protections and remedies sufficient to satisfy the requirements of the present Convention. Moreover, federal, state and local laws already provide a comprehensive basis for challenging discriminatory statutes, regulations and other governmental actions in court, as well as certain forms of discriminatory conduct by private actors. Given the extensive provisions already present in U.S. law, there is no discernible need for the establishment of additional causes of action or new avenues of litigation in order to enforce the essential requirements of the Convention. Declaring the Convention to be non-self-executing in no way lessens the obligation of the United States to comply with its provisions as a matter of international law.

Proposed Declaration: "The United States declares that the provisions of the Convention are not self-executing."

e. Dispute Settlement

Article 22 of the Convention provides for the referral of any dispute between two or more States Parties over the interpretation or application of this Convention, which is not settled by negotiation or the alternative procedures (such as conciliation) provided for elsewhere in the treaty, to the International Court of Justice at the request of any of the parties to the dispute.

The general practice in recent Administrations with respect to such "compulsory submissions" to ICJ jurisdiction, which are common in virtually all U.N. treaties, has been to enter a reservation to such provisions. It is not proposed to change this general practice with respect to the current treaty at this time. The Administration strongly supports the use of international dispute resolution mechanisms in appropriate cases, but believes that it is prudent for the United States Government to retain the ability to decline a case which may be brought by another country for frivolous or political reasons.

In fact, recourse to the International Court of Justice is only an ancillary possibility for dispute resolution and has not played an important role in implementing the treaty (indeed, no state has ever brought a claim to the Court under this Convention). Instead, the principal oversight functions are performed by the Committee on the Elimination of Racial Discrimination, and the United States fully accepts the competence of the Committee in that regard. The Committee also has competence to consider complaints by one State Party that another is not giving effect to the provisions of the Convention; even though no such complaint has ever been brought, the Administration proposes to accept that competence as well. Moreover, in the event that such a dispute is not resolved by the Committee to the satisfaction of the parties, there is the additional possibility of appointment of an *ad hoc* Concilia-

tion Commission to resolve the dispute. Finally, there is ample opportunity to seek fair and effective judicial review and remedy of situations of alleged discrimination in U.S. courts under the Constitution and laws.

In sum, the Administration does not believe the following reservation will significantly curtail the possibility of effective resolution of any disputes, should they arise, or undermine the oversight of implementation of the treaty's provisions.

Proposed Reservation: "With reference to Article 22 of the Convention, before any dispute to which the United States is a party may be submitted to the jurisdiction of the International Court of Justice under this article, the specific consent of the United States is required in each case."

IV. OTHER ISSUES

During the consideration of the Convention within the Executive Branch and in consultations with various interested non-governmental organizations, a number of questions and concerns were raised with regard to various aspects of the undertakings set forth in the Convention on which the Administration believes the record should be clear but which do not warrant inclusion in the Senate's resolution of advice and consent or in the instrument of ratification as specific reservations, understandings or declarations.

Ethnic Origin and Descent.—Although the definition of racial discrimination contained in Article 1(1) of the Convention contains two specific terms ("descent" and "ethnic origin") not typically used in federal civil rights legislation and practice, there is no indication in the negotiating history of the Convention or in the Committee's subsequent interpretation that those terms encompass characteristics which are not already subsumed in the terms "race," "color," and "national origin," as they are used in existing federal law. *See e.g., Saint Frances College* v. *Al-Khazraji,* 481 U.S. 604 (1987); *Shaare Tefila Congregation* v. *Cobb,* 481 U.S. 615 (1987); *Roach* v. *Dresser Industrial Valve,* 494 F. Supp. 215 (W.D. La. 1980). The United States thus interprets its undertakings, and intends to carry out its obligations, under the Convention on that basis.

Special Measures.—Article 1(4) specifically excludes from the definition of "racial discrimination" "[s]pecial measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection" in order to provide equal enjoyment of human rights and fundamental freedoms. Such measures may not, however, lead to the maintenance of "unequal or separate rights for different racial groups" or "be continued after the objectives for which they were taken have been achieved." Article 2(2) provides that, when circumstances so warrant, States Parties may take "special and concrete measures" for the "adequate development and protection of certain racial groups or persons belonging to them for the purpose of guaranteeing to them the full and equal enjoyment of human rights and fundamental freedoms." Deciding when such measures are in fact warranted is left to the substantial discretion of each State Party. Together, Article 1(4) and Article 2(2) permit, but do not require, States Parties to adopt race-based affirmative action programs without violating the Convention.

There are a number of existing federal, state and local affirmative action measures that would be considered "special and concrete measures" for the purpose of Article 2(2). These include the array of programs for Native Americans, minority preferences in the field of employment, set-asides for minority contractors, race-conscious educational scholarships, and creation of minority electoral districts as a remedy for violations of the Voting Rights Act, to name a few. However, the exact line between permissible and impermissible affirmative action measures has been one of the most difficult issues in U.S. law, and it has not been static. See, e.g., *Regents of University of California* v. *Bakke,* 438 U.S. 265 (1978); *City of Richmond* v. *J.A. Croson Co.,* 488 U.S. 469 (1989); *Metro Broadcasting, Inc.* v. *FCC,* 497 U.S. 647 (1990). It is the Administration's view that the Convention does not impose any obligation which would prevent or require adoption and implementation of appropriately-formulated affirmative action measures that are otherwise consistent with U.S. constitutional and statutory provisions.

Implementing Legislation.—Because existing U.S. law already provides constitutional and statutory protections against racial discrimination sufficient to meet the requirements of the Convention, it was not deemed necessary or appropriate to propose new implementing legislation for this treaty in particular. It has been noted, however, that Article 5 obliges States Parties not only to prohibit and eliminate racial discrimination in all its forms but also to guarantee the right of everyone to equality before the law, without distinction as to race, color, or national or ethnic origin, "notably in the enjoyment" of a list of specifically enumerated rights, some of which may be characterized as economic, social and cultural rights not now ex-

plicitly recognized in U.S. law. However, States are not required by Article 5 to ensure observance of each of the rights listed in that article, but rather to prohibit discrimination in the enjoyment of those rights to the extent they are provided by the domestic law. In this respect, U.S. law fully complies with the requirements of the Convention.

Discriminatory Purpose and Effect.—Article 2(1)(c) requires States Parties to "take effective measures to review governmental, national and local policies * * * which have the effect of creating or perpetuating racial discrimination." Article 2(1)(c) also requires States Parties to "amend, rescind or nullify any laws and regulations" that have such effects.

The U.S. satisfies the policy review obligation of Article 2(1)(c) through this nation's legislative and administrative process, as well as through court challenges brought by governmental and private litigants. With respect to the second obligation of Article 2(1)(c), practices that have discriminatory effects are prohibited by certain federal civil rights statutes, even in the absence of any discriminatory intent underlying those practices. Thus, such practices may be nullified under the force of those statutes, consistent with Article 2(1)(c). This is true of the Voting Rights Act of 1965, which Congress amended in 1982 to make clear that practices that have discriminatory results violate Section 2 of that statute. It is also true of Title VII of the 1964 Civil Rights Act, the federal regulations implementing Title VI of the 1964 Civil Rights Act, and the Fair Housing Act, as those statutes have been interpreted by the Supreme Court and lower courts. *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971) (Title VII); *Guardians Ass'n* v. *Civil Serv. Comm'n*, 463 U.S. 582 (1983) (Title VI implementing regulations); R. Schwemm, *Housing Discrimination Law and Litigation* § 10.04 (1990) (noting that although the Supreme Court has yet to address the issue, lower courts have uniformly held that disparate impact claims may be brought under the Fair Housing Act, even in the absence of discriminatory intent). Those three statutes prohibit intentional racial discrimination. But even in the absence of evidence of discriminatory intent, plaintiffs can make out a *prima facie* case of discrimination in violation of the statutes if they show that a race-neutral practice causes statistically significant racial disparities. If the plaintiff satisfies the prima facie test, the burden shifts to the defendant to justify the practice by demonstrating its necessity.

By contrast, the equal protection components of the Fifth and Fourteenth Amendments, as well as 42 U.S.C. §§ 1981 and 1982, have been interpreted to proscribe only intentional discrimination. See *Washington* v. *Davies*, 426 U.S. 229 (1976) (Equal Protection Clause); *General Building Contractors Ass'n, Inc.* v. *Pennsylvania*, 458 U.S. 375 (1982) (Section 1981); R. Schwemm, *Housing Discrimination Law and Litigation* § 10.04 (1990). This is not to say that disparate impact is irrelevant in equal protection or Sections 1981 or 1982 litigation. Determining whether discriminatory purpose exists "demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available." *Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U.S. 252, 266 (1977). Disparate impact "may provide an important starting point" for that inquiry. *Id.* Indeed, where racial disparities arising out of a seemingly race-neutral practice are especially stark, and there is no credible justification for the imbalance, discriminatory intent may be inferred. *See Casteneda* v. *Partida*, 430 U.S. 482 (1977). In most cases, however, adverse effect alone is not determinative, and courts will analyze statistical disparities in conjunction with other evidence that may be probative of discriminatory intent. *Arlington Heights*, 429 U.S. at 266–67. If the totality of the evidence suggests that discriminatory intent underpins the race-neutral practice, the burden shifts to the defendant to justify that practice. *Id.* at 270–71 n.21 (citing *Mt. Healthy City School Bd. of Education* v. *Doyle*, 429 U.S. 274 (1977)).

The negotiating history of the Convention leaves unclear the precise scope of a State Party's obligation under Article 2(1)(c). It does not appear to be the case, however, that the provision requires the invalidation of every race-neutral law, regulation or practice that causes some degree of adverse impact on racial groups. In its recently adopted General Recommendation XIV, the Committee declared that "in seeking to determine whether an action has an effect contrary to the Convention, it will look to see whether that action has an unjustifiable disparate impact upon a group distinguished by race, colour, descent, or ethnic origin."

The Committee's use of the term "unjustifiable disparate impact" indicates its view that the Convention reaches only those race-neutral practices that both create statistically significant racial disparities and that are unnecessary. This reading of Article 2(1)(c) tracks the standards for litigating disparate impact claims under Title VII, the Title VI implementing regulations, and the Fair Housing Act. It is also consistent with equal protection and Sections 1981 and 1982 standards, to the extent that statistical proof of racial disparity—particularly when combined with other cir-

cumstantial evidence—is probative of the discriminatory intent that is necessary to make out a claim under those provisions and shift the burden to the defendant to justify a race-neutral practice. The Administration thus believes that Article 2(1)(c) is best interpreted as not imposing obligations that are contrary to U.S. law.

Territorial Application.—The reach of the Convention is extensive. It contains repeated references, which have been emphasized by the Committee, that its obligations apply to States with respect to *all territories* under their jurisdiction; thus, U.S. obligations would extend to the fifty states as well as the District of Columbia, the commonwealths, territories and other possessions under U.S. jurisdiction. There appears to be no basis in the text or negotiating history of the Convention to support extraterritorial application. Indeed, the nature of the obligations undertaken, the specific exclusion of distinctions between citizens and non-citizens, and the requirement in Article 6 to provide remedies and protections to "everyone within their jurisdiction" suggest clearly that the Convention was intended to apply territorially. Since this interpretation is consistent with the general presumption of treaty law, the United States understands the Convention to apply to the territory of the United States, including the commonwealths, territories and possessions.

State to State Complaints.—In addition to considering periodic reports from States Parties concerning implementation of their obligations, the Committee may receive inter-state complaints alleging non-compliance. This competence applies automatically to all States Parties, not merely on the basis of reciprocal acceptance (as is the case under the Covenant on Civil and Political Rights). Once it becomes a party, the United States therefore will be able to raise questions of non-compliance concerning other States Parties. The procedure for considering such complaints is relatively informal; the Committee may not call witnesses or conduct on-site investigations; and its decisions are not legally binding.

Individual Petitions.—Article 14 of the Convention permits (but does not require) a State Party to accept the competence of the Committee to receive and consider communications from individuals or groups of individuals within its jurisdiction who claim to be victims of a violation by that State of any of the rights set forth in the Convention. Only a few States Parties to the Convention have to date made such a declaration, and accordingly this procedure has been rarely invoked. Given the requirement of prior exhaustion of domestic remedies, and the strength of remedies currently available under U.S. law for allegations of racial discrimination, the Administration's view is that it is not necessary to make a special declaration accepting the Committee's competence in this regard, while noting that one can always be done subsequently. A similar recommendation was made with respect to individual complaints with respect to the International Covenant on Civil and Political Rights.

Financial Implications.—As originally drafted, the Convention provided that "States parties shall be responsible for the expenses of the members of the Committee (on the Elimination of Racial Discrimination) while they are in performance of Committee duties." Article 8(6). The United Nations General Assembly, however, decided in resolution 47/111 of December 16, 1992, that as from January 1, 1994 this Committee (like the other treaty-based bodies) would be financed under the regular UN budget. Thus, becoming a party to this Convention will not entail any additional cost to the United States for the expenses of the Committee. As from January 1 of this year, the United States will contribute to this expense, whether or not it is a party, as part of its contribution to the UN budget.

The submission of the biennial implementation reports called for in the Convention, and such other dealings with the Committee as may be required, will foreseeably have implications for personnel resources of a limited character.

It should be noted that a formal amendment has been proposed with respect to Article 8 of the Convention, which would conform the text of the Convention to the current practice. This amendment would replace paragraph 6 and adding a new paragraph 7 as follows:

> (6) The Secretary-General of the United Nations shall provide the necessary staff and facilities for the effective performance of the functions of the Committee under the Convention.
>
> (7) The members of the Committee established under the present Convention shall, with the approval of the General Assembly, receive emoluments from United Nations resources on such terms and conditions as the General Assembly may decide.

This amendment was communicated to all States parties on March 1, 1993. The amendment will enter into force when accepted by two-thirds majority of States parties. As of December 31, 1993, notification of acceptance had been received from 5 of 132 States parties to the Convention. In keeping with the current situation and our general position that international human rights machinery should be better co-

ordinated and adequately supported, the Administration proposes to submit the amendment, and a comparable change to the Torture Convention, to the Senate for its advice and consent at an appropriate time in the future.

Mr. HARPER. Thank you, Mr. Chairman.

The CHAIRMAN. Thank you.

The next panel is the public panel. First, as it should be, there is a colleague here, and I only wish he was still a Member of Congress, Father Robert Drinan, Georgetown University Law Center, professor, former chairman, individual rights and responsibilities of the American Bar Association. We also have Mr. William Lake, Mr. Wade Henderson, and Dr. Henderson. I think we will start out with Father Drinan.

STATEMENT OF ROBERT DRINAN, S.J., ON BEHALF OF THE AMERICAN BAR ASSOCIATION [ABA]

Father DRINAN. Thank you, Mr. Chairman.

My name is Robert Drinan. I am a former member of the House, and now teach at Georgetown University Law Center. I am testifying, Mr. Chairman, on behalf of the American Bar Association. Mr. William Ide, the ABA president, unfortunately, cannot be in Washington today.

The ABA commends you for conducting today's hearings. The United States played a major part in drafting the Race Convention, and signed it on September 28, 1966. The treaty came into force in 1968, and 135 nations have endorsed it.

Mr. Chairman, I was here when you graciously held hearings on this very issue in 1979. And I was very proud that the American Bar Association at that time testified. There was virtually no opposition.

We hope that now, some years later, especially in the year commemorating the 40th anniversary of *Brown* v. the *Board of Education,* that the Senate, the entire Senate, will ratify this treaty.

Mr. Chairman, it has been 30 years since the Congress enacted the Civil Rights Act, and I think that now is the time to, if you will, join the world. The United States, as one of the most powerful nations on the Earth, undermines the international human rights movement by failing to become a party to this treaty.

And it is self-evident, Mr. Chairman, that the ethnic tensions of the Earth would be, to some extent, alleviated if the United States were a partner in the committee monitoring the Race Convention, and in so many other ways.

The ABA policy supporting ratification was adopted in 1979. And this group of 380,000 lawyers is very committed to the rule of law around the world and to the ratification of this treaty. Mr. Chairman, it is very clear that the treaty parallels very closely U.S. constitutional and statutory law.

There are three or four reservations proposed by the administration. The ABA agrees with the administration on the reservation with regard to freedom of speech. There is a difference with regard to the ICJ.

There is virtually no difference on private conduct. I think that can be arranged in the treaty so that the nongovernmental groups are in accord.

There is a dispute, an honest difference, among lawyers about the International Court of Justice. The ABA is maintaining its

steadfast commitment to world order under law, and its conviction that acceptance by all nations of the ICJ would lead to attainment of that goal.

Mr. Chairman, in the appendix of my testimony there is a sophisticated statement of the ABA with regard to a middle position, if you will, on the ICJ. I will allow the other NGO's to speak about the other declarations and understandings.

In conclusion, Mr. Chairman, the United States years ago pledged to promote the observance of human rights and fundamental freedoms in article 55 and 66 of the U.N. Charter, and this treaty is a means of putting that into effect.

President Carter had eloquent words here in 1979 when he submitted the commitment of that administration to the enactment of this treaty.

Today it seems to me that the United States is missing a significant opportunity to foster its own commitments to human rights and human rights law and to contribute its expertise to that all around the world.

I was with Mr. Shattuck, Mr. Chairman, at the World Convention on Human Rights in Vienna in June 1993. I represented the American Bar Association there.

At that time it was very clear to me and embarrassing that the United States is not taking the lead that it should in this area. I hope that today and very shortly the United States will finally ratify the Race Convention.

Mr. Chairman, it is the commitment of the American Bar Association to work with you and with the executive branch to assure that the Race Convention is ratified this year. And again we thank you for this hearing and for all of your cooperation through so many years with internationalization of human rights.

The CHAIRMAN. Thank you very much, indeed. And thank you for your kind words.

[The prepared statement of Father Drinan follows:]

PREPARED STATEMENT OF FATHER DRINAN

Mr. Chairman and Committee Members: My name is Robert F. Drinan. I am a former member of Congress and currently teaching law at the Georgetown University Law Center. I am testifying today on behalf of the American Bar Association ("ABA") at the request of ABA President R. William Ide III.

I am grateful for the opportunity to appear before you today as the Senate Foreign Relations Committee begins to consider the ratification process of the International Convention on the Elimination of All Forms of Racial Discrimination ("Race Convention"), which seeks the eradication of racial discrimination in the world. The importance—to the United States and the world—of prompt Senate ratification of the Race Convention cannot be understated. United States criticism of other governments for alleged human rights violations is seriously undermined by nonratification. As we observe the news each day, Eleanor Roosevelt's statement still resonates: "No democracy can long survive which does not accept as fundamental to its very existence the recognition of the rights of minorities."

The ABA commends you for convening today's hearing. The United States played a major role in drafting the Race Convention and signed it on September 28, 1966, almost 30 years ago. This treaty came into force on January 4, 1969, when, as provided by Article 19 of the Convention, the first twenty-seven (27) member states had ratified or acceded to it. Since that time another 111 documents of ratification or accession have been deposited with the Secretary-General of the United Nations. Yet one country remains conspicuously missing from the list—the United States of America.

On February 23, 1978, President Carter sent the Race Convention to the United States Senate for its advice and consent to ratification. This Committee held a hear-

ing in 1979; however, in the 16 years since that action the Race Convention has been in limbo. It is time—past time—to move forward to ratify this treaty and, in doing so, send a message to minorities here, as well as abroad, of this country's firm and continuing resolve to end racial discrimination against all people.

Certainly, the United States has made some impressive advances towards racial equality even without a Race Convention. Forty years ago this year, in *Brown* v. *the Board of Education,* 347 U.S. 483 (1954), the United States Supreme Court held that separate schools for black children and white children are inherently unequal and that all public schools must be open to all children, regardless of the color of their skin. It has been 30 years since Congress enacted the Civil Rights Act that banished barriers to equal access, officially ushering in an era in which blacks and whites were to live and work together. Legislative and policy actions since then have been adopted in efforts to increase opportunities for minorities.

In recent years, we also have seen deep and widespread changes in United States law and attitude toward human rights and the ascendancy of human rights in regional and international forums. Yet in light of this significant progress, continued United States inaction on human rights treaties, such as the one before you today, confuses both our citizens, when they learn of it, and our allies.

Beyond symbolism, there is also substantive significance to the United States' reluctance to ratify the Race Convention. The United States, as one of the most powerful states in the world, undermines the international human rights movement by failing to become a party to the Race Convention. If the United States ratified the Convention now, it would be reinforcing its efforts in other areas to underscore the importance of human rights specifically and rule of law generally around the world. By ratifying the Race Convention, the United States also would be bolstering its credibility as an avid supporter of international human rights norms, especially with regard to discrimination on the basis of race, color, and national or ethnic origin.

The United States will be better positioned to actively influence the further development of international human rights norms with respect to nondiscrimination. Finally, the Race Convention could be an effective tool for the United States to address the long-suppressed ethnic tensions re-emerging in conflicts throughout the post-Cold War world. Unfortunately, ethnic animosity and hatred have become part of the current political landscape, and racial and ethnic discrimination is the root cause of much of the conflict. In short, ratification of the Race Convention will serve United States interests on both the domestic and international fronts.

In 1978, the ABA House of Delegates adopted policy on the basis of a recommendation and report submitted by the ABA Section of International Law and Practice supporting the ratification by the United States of the Race Convention, subject to certain reservations, understandings, and declarations ("RUDs"). Since that time, a number of developments have occurred in response to changing circumstances and Administrations. The ABA's commitment to the Race Convention, however, remains strong and intact.

In general, the Race Convention is designed to forbid racial and ethnic discrimination in all fields of public life. Its terms closely parallel United States constitutional and statutory law as interpreted by the Courts, and from a legal perspective, the Convention generally is consistent with existing U.S. law.

Articles 1 through 7 contain substantial provisions. Article 1 defines "racial discrimination," but specifies that this definition does not include distinctions made by a State Party between citizens and non-citizens. Article 2 specifies steps to be taken to eliminate racial discrimination. Article 3, prohibiting racial segregation and apartheid, should be read in conjunction with Article 5, which enumerates certain fundamental rights, the enjoyment and exercise of which must be protected against abridgement by racial discrimination. These protections include the right to housing, employment, and access to any place or service intended for use by the general public.

Article 4 condemns propaganda and organizations based on racial hatred or superiority. Article 5 contains various provisions for the protection of individual rights, including freedom of speech, association, and movement, without regard to race, color, or national or ethnic origin.

Articles 6 and 7 require States to provide effective protection and remedies through competent tribunals and other government institutions against acts of racial discrimination that violate the Convention and to undertake active programs to combat racial discrimination and prejudice.

Articles 8 through 16 constitute the administrative and enforcement provisions of the Convention. They establish a Committee on the Elimination of Racial Discrimination, to which States Parties submit reports describing the measures they have adopted that give effect to the Convention's provisions. The Committee may make

recommendations based on the reports and information received from States Parties. These articles also establish a procedure by which States Parties may submit complaints to the Committee alleging that other States Parties are not abiding by the terms of the Convention. A conciliation procedure is provided for the settlement of such disputes. No legally binding recommendations or awards are permitted.

Article 14 permits, but does not require, a State Party to declare that it recognizes the competence of the Committee to receive and consider communications from individuals or groups of individuals who are within the jurisdiction of that State Party, and who claim to be victims of a violation by that State Party of any of the rights set forth in the Convention. Individual complaints may be considered by the Committee only after all available domestic remedies have been exhausted.

Article 16 confirms that the procedures for resolution of disputes and complaints provided in the Convention are additional to, rather than a substitute for, procedures for States Parties that may have agreed to other mechanisms.

Articles 17 through 25 are the final clauses. Article 22 provides that any dispute over Convention interpretation or application that is not settled by negotiation or by the procedures provided for in the Convention shall, at the request of any party to the dispute, be referred to the International Court of Justice unless the disputants agree to another mode of settlement.

PROPOSED RESERVATIONS, UNDERSTANDINGS, AND DECLARATIONS

Reservations, understandings, and declarations ("RUDs") have been a key component of all human rights treaties considered to date by the United States. In each case, the RUDs have been recommended by either the executive branch or members of the legislative branch. The ABA offers the following comments about the RUDs and certain treaty provisions in the Clinton Administration's package on the Race Convention. For quick reference, Addendum A of this testimony contains the summary text of the "Proposed Reservations, Declaration, and Understandings of the United States."

1. Reservation: Freedom of Speech, Expression, and Association

The Administration proposes a reservation to Article 4 of the Convention, regarding freedom of speech, expression, and association, on the grounds that the requirements contained in this Article are inconsistent with the First Amendment. The ABA agrees with this position. Paragraphs (a) and (b) of the Article provide a restriction on the dissemination of ideas that would violate the freedom of expression and association guarantees of the Constitution.

The ABA supports this reservation and in fact believes that, in general, human rights treaties should promote, rather than restrict, the guarantee of rights already granted to the people of the United States by our Constitution. Under the First Amendment, opinions and speech in most circumstances are protected without regard to content. Any attempt by the government to restrict or prohibit the expression or advocacy of certain ideas, regardless of what the content of that expression is or how objectionable it may be, is sharply curtailed by the First Amendment to the Constitution, if not rejected outright.

2. Reservation: Private Conduct

The Administration has proposed a reservation concerning the treaty language regarding "private conduct" because of the possibility that the provision could be construed as imposing a requirement on the government to enact legislation or undertake other measures to prohibit and punish purely private conduct. "Private conduct" is held to lie beyond the proper scope of governmental regulation. The ABA agrees in principle with this reservation because individual privacy and freedom from governmental intervention in private conduct are considered to be fundamental values of our democracy. The ABA's view is that any regulation of "private conduct" could extend only to governmental or government-assisted activities and to private activities required to be available on a non-discriminatory basis as defined by the Constitution and laws of the United States.

Although the Race Convention recognizes that some areas of private activity fall beyond the reach of the government's obligation to protect against discrimination, the potential application of the relevant Articles to all matters within the sphere of "public life" is so broad that the Administration properly wants to ensure protection to our privacy interests.

3. Reservation: Dispute Resolution

With respect to adhering to the jurisdiction of the International Court of Justice ("ICJ"), in the past the United States' position has been to propose a reservation. Similarly, although the Clinton Administration supports the use of international

dispute resolution mechanisms in appropriate cases, the Administration also believes that it would be prudent for the United States to retain the ability to decline the ICJ's jurisdiction in a particular case.

The ABA maintains its steadfast commitment to world order under law and its conviction that acceptance by all nations of the jurisdiction of the International Court of Justice would lead to the attainment of this goal. The ABA has urged, however, that United States agreement to ICJ jurisdiction should be gradual, rather than immediate, with respect to any State Party to the Convention, regardless of its relations with the United States. Specifically, the ABA has proposed adoption of a "building block" approach under which the United States would develop agreements with individual States or groups of States, to accept in advance ICJ jurisdiction in cases of interpretation or application of the Convention, which involve those States, and would leave the door open for increasing the Court's jurisdiction, step by step, should the circumstances justify it.

This approach is less restrictive than the Administration's proposed reservation and may offer a middle ground between those who oppose this reservation and those who support it. A copy of the ABA's 1989 policy on ICJ jurisdiction is attached to this testimony as Addendum B for your consideration.

4. Understanding: Federal-State Implementation

The Administration's proposed understanding concerning federal-state implementation is intended to ensure that the Race Convention will not violate our governmental principles concerning the distribution of powers between the federal government and the individual states.

The ABA is on record supporting this type of understanding. The ABA urges the Administration to commit to implementing all the provisions of the Convention over whose subject matter the Federal Government exercises legislative, judicial or administrative jurisdiction. In the areas where states exercise jurisdiction, the federal government should do everything within its power to ensure that states take appropriate measures to fulfill the terms of this Covenant.

5. Declaration: Non-Self-Executing Treaty

The issue of non-self-execution has been raised in the context of other treaties. The Administration's proposed declaration that, "the provisions of Articles 1 through 7 are not self-executing," identically reflects ABA policy. This declaration is intended to assure that the Race Convention will not circumvent the structural nature of our government. Implicit in this declaration is the assumption that any further implementation required by the Convention will be addressed through the United States' legislative or judicial processes.

The ABA supports this proposed declaration and, in doing so, emphasizes its own position that declaring the Race Convention to be a non-self-executing treaty in no way lessens the obligation of the United States to comply with its provisions as a matter of international law. With respect to issues not covered by the RUDs, the law of the United States or decisions of the courts already provide for sufficient execution of the Convention.

CONCLUSION

Pursuant to the United Nations Charter, the United States has pledged to promote the observance of human rights and fundamental freedoms without distinction as to race. The International Convention on the Elimination of All Forms of Racial Discrimination is the means of putting into effect this pledge. As President Carter stated in his address to the United Nations in 1977:

> "All the signatories of the UN Charter have pledged themselves to observe and to respect basic human rights. Thus, no member of the United Nations can claim the mistreatment of its citizens solely its own business. Equally, no member can avoid its responsibilities to review and to speak when torture or unwarranted deprivation occurs in any part of the world.
>
> The basic thrust of human affairs points toward a more universal demand for fundamental human rights. The United States has a historical birthright to be associated with this process.
>
> We in the United States accept this responsibility in the fullest and the most constructive sense. Ours is a commitment and not just a political posture. I know perhaps as well as anyone that our own ideals in the area of human rights have not always been attained in the United States, but the American people have an abiding commitment to the full realization of these ideals. And we are determined, therefore, to deal with our deficiencies quickly and openly. We have nothing to conceal."

This Convention is widely accepted throughout the world, as evidenced by the fact that more than 135 states have become parties to it. Because it is not a State Party

to the Race Convention, the United States has been excluded from participation in the human rights bodies, established to monitor human rights practices of signatory states and interpret the meaning and implications of the Convention's terms. As a result, the United States is missing a significant opportunity to foster its own concepts of human rights and human rights law and to contribute its expertise to evolving international human rights theory and practice as applied to both established and emerging democracies.

The United States takes pride in its leadership on human rights to end racial discrimination, a subject matter to which this country is deeply committed and qualified to act from its own experience. Its failure to ratify the Race Convention suggests to other nations that we are either ethnocentric or indifferent to racial and ethic concerns. We believe that this country is neither. We urge you to affirm that belief for citizens in this country and throughout the world by ratifying the Race Convention.

It is our commitment to work with you and the Executive Branch to assure that the Race Convention is ratified by the United States this year. Today we commit to assisting you to achieve ratification and to ensure that its principles indeed have meaning in this country and abroad.

Addendum A.—Proposed Reservations, Declarations and Understandings of the United States

1. Reservation: Freedom of Speech, Expression and Association

"The Constitution and laws of the United States contain extensive protections of individual freedom of speech, expression and association. Accordingly, the United States does not accept any obligation under this Convention, in particular under Articles 4 and 7, to restrict those rights, through the adoption of legislation or any other measures, to the extent that they are protected by the Constitution and laws of the United States."

2. Reservation: Private Conduct

"The Constitution and laws of the United States establish extensive protections against discrimination, reaching significant areas of non-governmental activity. Individual privacy and freedom from governmental interference in private conduct, however, are also recognized as among the fundamental values which shape our free and democratic society. The United States understands that the identification of the rights protected under the Convention by reference in Article 1 to fields of "public life" reflects a similar distinction between spheres of public conduct that are customarily the subject of governmental regulation, and spheres of private conduct that are not. To the extent, however, that the Convention calls for a broader regulation of private conduct, the United States does not accept any obligation under this Convention to enact legislation or take other measures under paragraph (1) of Article 2, subparagraphs (1) (c) and (d) of Article 2, Article 3 and Article 5 with respect to private conduct except as mandated by the Constitution and laws of the United States."

3. Reservation: Dispute Settlement

"With reference to Article 22 of the Convention, before any dispute to which the United States is a party may be submitted to the jurisdiction of the International Court of Justice under this article, the specific consent of the United States is required in each case."

4. Understanding: Federal-State Implementation

"The United States understands that this Convention shall be implemented by the Federal Government to the extent that it exercises jurisdiction over the matters covered therein, and otherwise by the state and local governments. To the extent that state and local governments exercise jurisdiction over such matters, the Federal Government shall, as necessary, take appropriate measures to ensure the fulfillment of this Convention."

5. Declaration: Non-Self-Executing Treaty

"The United States declares that the provisions of the Convention are not self-executing."

Addendum B.—American Bar Association Section of International Law and Practice*

RECOMMENDATION

BE IT RESOLVED that the American Bar Association reaffirms its steadfast commitment to world order under the rule of law and its conviction that acceptance by all the nations of the jurisdiction of the International Court of Justice would lead to the attainment of this goal.

BE IT FURTHER RESOLVED that the American Bar Association urges the Government of the United States to initiate efforts to negotiate with various states and groups of states a series of treaties accepting the jurisdiction of the International Court of Justice with respect to disputes arising under international agreements to which the disputants are parties but which do not contain effective provisions for the settlement of disputes between them, it being understood that any such treaty may provide for submission of such disputes to a Special Chamber of the International Court of Justice should one party to the dispute request it.

BE IT FURTHER RESOLVED that the American Bar Association welcomes and supports the recent initiatives of the United States and the Soviet Union with regard to increasing recourse to the Court for the settlement of legal disputes and recommends that, to this end, the Government of the United States conclude a treaty with the Soviet Union under which the two States would agree to submit to the International Court of Justice or, at the request of either Party, to a Special Chamber of the Court to be established in accordance with a procedure provided for in the treaty, any dispute between them relating to the interpretation or application of international agreements, which are in force. which they have both ratified, and which are listed in an annex to the treaty, it being understood that any other international agreement ratified by both States might be added to the list in accordance with a procedure provided for in the treaty.

BE IT FURTHER RESOLVED that the American Bar Association recommends the conclusion by the United States of similar treaties for the settlement of international disputes with States or groups of States which have close links with the United States, submitting to the International Court of Justice or, at the request of one of the parties to the dispute, to a Special Chamber of the Court established in accordance with a procedure provided for in the treaty, disputes relating to the interpretation or application of any one of the international agreements listed by name or category in an annex to the dispute settlement treaty, which are in force and have been ratified by the parties to the dispute, it being understood any other such international agreement or category of agreements might be added to the list in accordance with a procedure provided for in the dispute settlement treaty.

BE IT FURTHER RESOLVED that the American Bar Association recommends that, in addition, the Government of the United States explore with other States or groups of States the conditions under which they would be willing to submit specified categories of disputes to the international Court of Justice.

REPORT

1. The American Bar Association is on record supporting adjudication before the International Court of Justice as a desirable method by which international disputes may be resolved. Although the judgments in the Nicaragua Case were controversial, the United States has been successful in the Court in other cases. The recent *Hostages in Tehran* and *Gulf of Maine* Cases illustrate how the Court may be beneficially used by the United States. Currently, the United States has before the Court a legal dispute with Italy relating to investments by United States citizens in that country. The United States will always have an interest in the promotion of world order through the rule of law, and in protecting by legal means the rights of United States citizens that have been violated by a foreign country. These interests will be advanced by increased use of the International Court of Justice.

States can confer compulsory jurisdiction on the Court either by making a general declaration under Article 36(2) of the Statute of the Court, or by concluding under Article 36(1) of the Statute an international agreement conferring compulsory jurisdiction on the Court with respect to specified disputes, such as those relating to the interpretation or application of a treaty or of some categories of treaties. This resolution proposes that the United States should at this time concentrate its efforts on promoting the second method through the negotiation of limited agreements under

*Respectfully submitted, August 1999, by Steven C. Nelson, Chairman, Section of International Law and Practice.

which clearly specified categories of disputes would be submitted to adjudication before the International Court.

2. The draft resolution proposes that the United States take four steps towards promoting the increased use of the jurisdiction of the international Court of Justice: (a) adopt a policy encouraging the negotiation of special agreements with individual states and groups of states consenting to the jurisdiction of the International Court of Justice with regard to disputes between them that arise under international agreements to which such states are parties, (b) open negotiations to produce a carefully circumscribed treaty consenting to International Court of Justice jurisdiction over certain agreements to which the United States and the Soviet Union are parties; (c) negotiate treaties with friendly States willing to consent to the Courts jurisdiction over a broader category of treaty disputes; (d) explore with other countries the possibility of finding some categories of disputes which might be submitted to the Court, subject to specified conditions.

3. The draft resolution proposes that the United States take the initiative to negotiate bilateral and multilateral agreements consenting to the jurisdiction of the International Court of Justice with respect to certain legal disputes that may arise between it and other states. Many international agreements to which the United States is a party establish legal rights and duties that may give rise to disputes. Some of those agreements contain compulsory and binding dispute settlement systems. Others do not. It is in the interest of the United States to provide for a mechanism by which the International Court of Justice, or a Special Chamber thereof, may resolve legal disputes arising out of such agreements if effective dispute settlement mechanisms are not available to the parties to the dispute (for instance, because of reservations made by them). The policy suggested in the instant resolution would encourage adjusting each jurisdictional clause to the political and economic relationship existing between the United States and various states or groups of states.

4. The proposed agreement with the Soviet Union would be limited to multilateral agreements which both parties have ratified. Some of them contain clauses conferring jurisdiction on the Court, which the United States has accepted, but to which the Soviet Union has made a reservation. Others contain optional clauses, which have to be accepted by a declaration recognizing the jurisdiction of the Court with respect to a particular treaty; the United States made such declarations in some, but not in all, cases; the Soviet Union has not made any such declarations. In a few cases, where reservations were not permitted, the Soviet Union nevertheless ratified the treaties and became bound by the Court's jurisdiction to interpret those treaties; it did that, for instance, with respect to several international labor conventions which United States has not yet ratified. Recently, the Soviet Union withdrew reservations to the jurisdiction of the Court under a few human rights treaties.

This resolution recommends that the United States attempt to reach agreement with the Soviet Union on the submission to the Court of disputes arising under clearly specified treaties.

5. It would be rather incongruous for the United States to accept a certain amount of jurisdiction of the International Court of Justice with respect to the Soviet Union, when no such jurisdiction exists with respect to States which have close links with the United States, and who are tied to the United States by many strong bonds of history and tradition. Despite such close links, the United States has no general agreement with these States accepting an international tribunal's jurisdiction in cases of legal disputes with any one of them. There are jurisdictional clauses in a few bilateral agreements with some of these countries, but they are usually of a limited scope, applying only to disputes under a particular agreement. The American Bar Association believes that within the community of Western nations, in particular, there is a general acceptance of the principle that the relations between them are subject to the rule of law and should be, therefore, justifiable before an international tribunal. Consequently, with respect to such states the United States should be able to accept the jurisdiction of the Court with respect to a much broader list of agreements than the one included in the treaty with the Soviet Union, and as soon as the experiment should prove successful, the United States might be willing to increase the jurisdiction of the Court by adding new categories of treaties to the list.

6. After taking these two important steps, the United States should explore the possible acceptance of the jurisdiction of the Court with respect to other States. The United States might agree with some States to recognize the jurisdiction of the Court under carefully drawn conditions, taking into account reservations made in the past by the various States concerned and the need to prevent a recurrence of situations in which the jurisdiction of the Court would not be acceptable to one or the other party to the dispute. Finally, there might be other situations in which no

agreement might be possible at this time, or only one limited to certain precisely delimited disputes, or requiring a considerable number of carefully drawn reservations.

7. As was noted above, this cautious "building block" approach is justified by the fact that the United States has diverse relationships with different groups of States, requiring distinct approaches in each category of cases. Nevertheless, through the several steps outlined above, the United States might be able to accept the jurisdiction of the Court to the extent appropriate for each State or group of States, leaving the door open for increasing the Court's jurisdiction, step by step, should the circumstances justify it.

8. It must be noted also that the resolution suggests that arrangements be made in the various treaties for establishing Special Chambers of the Court, similar to some extent to those agreed upon in several recent cases before the Court, thus facilitating further the acceptance of the jurisdiction of the Court by the United States. Each treaty would provide an appropriate procedure for selecting the members of the Chamber in a manner similar, to some extent, to that being used for selecting members of international arbitral tribunals, but taking into account the Court's rules of procedure relating to Special Chambers.

The CHAIRMAN. Now we turn to Mr. Wade Henderson, director of the Washington Bureau of the National Association for the Advancement of Colored People, the NAACP.

STATEMENT OF WADE HENDERSON, DIRECTOR OF THE WASHINGTON BUREAU OF THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE

Mr. HENDERSON. Thank you, Mr. Chairman. Good morning.

It is indeed a pleasure to join you on behalf of the National Association for the Advancement of Colored People and this historic effort in support of ratification of the International Convention on the Elimination of All Forms of Racial Discrimination.

The NAACP was founded in 1909 and is today the oldest and largest civil rights organization in the nation, with well over 500,000 members both here and abroad.

Our original purpose in organizing in 1909 was to address and, in fact, eradicate forms of racial discrimination in the United States, and achieving full equality for African-Americans before the law.

Over the years, however, our search for civil rights for African-Americans and for other persons of color has lead us to a broadened agenda to include the more fundamental struggle for human rights both here and abroad.

Now, the history of racial discrimination in this country is well-known to you, Mr. Chairman, and to other members of the committee, and I will not use my 5 minutes to belabor that point.

However, it is necessary to revisit briefly a progression of events in our collective history as a way of helping to define the importance of what we seek to accomplish today. We think the history of the NAACP is especially appropriate and relevant to today's discussion, since our existence spans much of the search for racial justice in the United States during the 20th century.

One of our earliest crusades against racial discrimination was in an effort to resolve the problem of lynching here in the United States, which was extraordinarily prevalent at the turn of the century.

As you know, Mr. Chairman, the Supreme Court in its decision in *Plessy* v. *Ferguson,* in 1896, established the doctrine of separate but equal before the law, which literally established and sanctioned

the worst forms of racial discrimination, and created a legal system which, to this very day, has yet to be fully dismantled.

Interestingly enough next week our country will celebrate, as Father Drinan noted, the 40th anniversary of *Brown* v. *The Board of Education.* And in the ensuing 98 years between *Plessy* and today, while progress in eliminating racial discrimination indeed has been made, there is a great deal yet to be done.

I cited the antilynching campaign of the NAACP, and, indeed, it was successful in helping to moderate what was an appalling practice that existed in our country for well over 300 years.

For example, between 1882 and 1927, some 4,951 individuals were lynched in the United States, the overwhelming majority of those victims being African-American, at the hands of white citizens.

Today, in the U.S. Senate, for example, we are wrestling with an offshoot of that same problem. Today the Senate will vote on the question of imposing the death penalty under the crime bill currently pending in conference between the House and the Senate.

We are deeply concerned that the death penalty provisions of that bill reflect a level of racial disparity in the way the death penalty is administered, which raises profound questions about whether fair justice can be obtained in the administration of the most severe penalty under the law.

And we see a real parallel in our effort to address on the one hand our historic effort to provide equal opportunity and justice under the law and the kinds of problems that we have identified today.

On the international front we note that President Clinton earlier this week announced a change in policy on behalf of Haitian refugees and a new policy committed toward the restoration of democracy in Haiti, and we fully support both efforts, and we commend the President for this dramatic change in position.

Our own involvement in this area actually goes back to 1915, when the United States conducted its first invasion of Haiti, largely because a number of American interests were being threatened at the time, and because of that intervention some 3,000 Haitian nationals were killed.

James Weldon Johnson, who was then the secretary of the NAACP, conducted our first human rights mission abroad in 1920, when he spent some 6 months in Haiti researching conditions on the island, and he prepared a report, which then went to Senator Warren Harding, which, in fact, served as the basis for hearings which were held in the U.S. Senate at that time, and which lead to the call for the restoration of Haitian sovereignty, which was achieved in 1933. The NAACP played a crucial role in both of those efforts.

Today, of course, we continue to ply our mission in trying to eradicate the problems of racial discrimination, and we addressed some of the most fundamental problems of that issue here in the United States, which are, in fact, as you know, the subjects of the international Convention, one being, for example, an elimination of housing discrimination and all forms of housing segregation in the United States.

And just as an example of the problem that we face, as you know, Mr. Chairman, the Congress first adopted a fair housing statute in 1968.

That statute was largely a symbolic statement of policy, which did not carry with it significant enforcement teeth or capability. Over the next 20 years, although we had a statute on the books that talked about eliminating housing discrimination, we had no genuine mechanism to address the problem under the law.

It was estimated that some 2 million cases of discrimination went unresolved annually. It was not until 1988 that we got the next set of amendments that actually had provided some meaningful enforcement.

Today, under the leadership of Secretary Cisneros and Roberta Auctenberg at the Fair Housing Office in the Department of Housing and Urban Development, we are beginning to see the fruits of an aggressive fair housing campaign.

It was not until they came into office and began enforcing the statute that we have actually begun to see some change.

But even now what we recognize is that there has been, under the law, a series of policies and statutes which have helped to enshrine discrimination in housing.

We see that same problem reflected in an assorted number of areas in several areas of policy and the law, not just housing, but employment, in voting rights, and in the problems of racial discrimination in the administration of the criminal justice system.

I can only say, Mr. Chairman, that we support the expeditious ratification of the Convention. We believe it is long overdue. We commend you and the committee for your persistence in bringing it forward.

We do note that there are reservations which have caused some point of concern over the past 30 years. We are deeply concerned that the agreement is considered nonself-executing, and we believe, in fact, that that reservation should not be noted. We believe it should be pursued so that we can have vigorous application of this Convention.

And last, we note the concerns about free speech. We simply want to go on the record as saying that free speech and protection of the first amendment has been essential to the NAACP, and to the civil rights movement as a whole, because without that capability under our own law, we would not have been able to challenge the status quo effectively, and we would hate to see that provision, in fact, eliminated in our own country.

So, Mr. Chairman, let me end by saying that we support your efforts, and we would be happy to work with you as you try to secure ratification of this agreement. Thank you.

[The prepared statement of Mr. Henderson follows:]

PREPARED STATEMENT OF MR. HENDERSON

Mr. Chairman and Members of the Committee: I appreciate the opportunity to present the views of the National Association for the Advancement of Colored People

(NAACP) in support of ratification of the International Convention on the Elimination of All Forms of Racial Discrimination.[1]

The NAACP was founded in 1909. It is the nation's oldest and largest civil right organization with over 500,000 members in the 50 states, the District of Columbia and abroad. The NAACP was organized primarily for the purpose of eliminating all forms of racial discrimination in the United States and of achieving full equality of African Americans before the law.[2] Over the years, however, the NAACP's quest for civil rights in the United States has broadened to include a more fundamental struggle for human rights both at home and abroad.

INTRODUCTION

The history of racial discrimination in America is undoubtedly well-known to the members of this Committee. However, it is necessary to revisit briefly the progression of events in our recent collective history as Americans which may help to define the importance of what we seek to accomplish today.

The impact of the Supreme Court's decision in *Plessy* v. *Ferguson*, 163 U.S. 537 (1896) produced in stark and legal reality the two worlds of race in America—one black and one white. This decision meant that the United States Supreme Court had officially sanctioned governmental separation and segregation of the races, thereby abdicating the federal government's role as a protector of racial minorities. *Plessy* legitimized the worst forms of race discrimination.

The process of racial subjugation, which was the essential core of slavery in America, had begun again in the 1870's; it was completed as our nation approached the twentieth century.

Next week our nation will celebrate the 40th anniversary of *Brown* v. *Board of Education*, 347 U.S. 483 (1954), the Supreme Court decision that effectively ended the "separate but equal" doctrine of *Plessy*. And though conditions for African Americans and other persons of color in our society have greatly improved and should be acknowledged, the conditions of these groups with regard to the general health, education and employment continues to reflect a racial disparity linked to a history of institutionalized racial discrimination.

One of the NAACP's earliest crusades for civil and human rights involved the struggle to end the abhorrent practice of the lynching of African Americans. Born in response to an epidemic of racial violence against blacks at the dawn of the 20th century, the NAACP's anti-lynching campaign took the form of legislative initiatives and aggressive public denunciations among persons of good will. Unfortunately, the campaign was only partially successful. There were 4,951 persons reportedly lynched in the United States between 1882 and 1927, 3,513 of the victims were African Americans and 1,438 whites. They were not considered sufficiently important to track until 1882 when the Chicago Tribune started including them in the year's summary of crimes, disasters and other phenomena. Ninety-two were women sixteen white and 72 black. From 1901 to 1910 846 persons were lynched in the United States, 92 were white and 754 were black.[3]

The anti-lynching bills succeeded in passing the House of Representatives several times, but they were always defeated in the Senate. Nonetheless, the NAACP's effort brought an end to the excesses of mob violence using public exposure and public pressure.

Similarly today, we are faced with the prospect of House-passed legislation addressing racial justice concerns and the value of African American lives meeting stiff opposition in the Senate. Specifically, while it has been clearly established that our nation regrettably tolerates remarkable racial disparities in capital punishment, it is reported that today the Senate is likely to deny that racial bias in death penalty cases is a significant problem when it takes a nonbinding vote scheduled on the "racial justice" provisions of the House Omnibus crime bill.[4]

We understand that the Senate is expected to vote on a resolution proposed by Senator Alfonse D'Amato (R-NY), expressing the "Sense of Senate" that the crime

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[1] On behalf of the NAACP, I especially want to acknowledge the contribution of human rights activist, Keith Jennings, for his assistance in the preparation of this testimony.

[2] See, Certificate of Incorporation of the National Association for the Advancement of Colored People, June 20, 1911. The incorporators stated the objectives of the NAACP as follows: " * * * To promote equality of rights and eradicate caste or race prejudice among the citizens of the United States; to advance the interests of colored citizens; to secure for them impartial suffrage; and to increase their opportunities for securing justice in the courts, education for their children, employment to their ability, and complete equality before the law."

[3] Mary Frances Berry, *Black Resistance White Law: A History of Constitutional Racism in America* (revised and updated edition New York: Penguin Press, 1994).

[4] See, Washington Post, "Congress Revisits Bias Issue in Capital Cases," by Kenneth J. Cooper, Wednesday, May 11, 1994, p. 4.

bill conferees "totally reject the [inclusion of the] "Racial Justice Act provisions" in the final crime bill. The NAACP strongly opposes Senator D'Amato's resolution and in the interests of justice and our long campaign for human rights at home and abroad we have urged Members of the Senate to vote against this resolution.

In the 1930s the NAACP shifted its focus from racial brutality to the grim economic conditions produced by the Great Depression. The Association lobbied fiercely against racial discrimination in New Deal programs. Only the imminent threat of a national march on Washington led to President Roosevelt's Executive Order to create a Fair Employment Practices Committee and to ban racial discrimination in industries which received federal contracts.

As the nation threw itself into world war II, the NAACP launched a second "war" to end discrimination and segregation in the Armed Services, while expanding employment opportunities on the home front. The 1954 *Brown* decision marked not only the end of a long struggle but also the beginning of a new one. Despite numerous—attempts to outlaw or ban the NAACP throughout the South, the Association pressed ahead with voter registration, sit-in demonstrations, and grassroots protests against injustice.

The NAACP's participation, along with organized labor and major Jewish organizations, in the formation of the Leadership Conference on Civil Rights (LCCR)—a coalition today of over 180 civil rights organizations—institutionalized broad-based support for social justice and equality. Over the years the LCCR has been an important partner in the Association's drive to win passage of civil rights legislation in Congress. It began with the 1957 Civil Rights Act—the first since Reconstruction. Subsequently, with the support of sympathetic Congresspersons, the coalition produced the Civil Rights Act of 1960 and 1964, the Voting Rights Act of 1965 and the 1968 Fair Housing Rights Act—laws which sought to ensure government protection for basic human rights.

The NAACP has an unrelenting history as an advocate for human rights. For example, the NAACP has maintained a long-standing interest in human rights in Haiti dating back to the administration of President Woodrow Wilson. The NAACP sent its first human rights mission to Haiti in 1920 after the United States seized control of the country—ostensibly to establish and maintain order—because of its concern over a Marine report indicating that more than 3,000 Haitians were killed by American forces.

James Weldon Johnson, the Assistant Secretary of the NAACP, conducted the fact-finding mission. His report was said to have been influential in getting the Hon. Warren G. Harding to conduct a Senate investigation of the situation in Haiti. Moreover, the NAACP relentlessly pressed for the restoration of Haitian sovereignty, which resulted in the 1933 Agreement for the removal of American forces.

Ironically, today's pursuit of justice and respect for human rights in Haiti continues to dominate much of our attention. The quest for democracy in Haiti remains the ultimate goal; and yet violence as a tool of political persecution has reached unprecedented levels of intensity. While we applaud Clinton Administration's recent announcement of a policy change toward Haitian refugees, we are mindful that the commitment to human rights in this context will be determined by how the policy is applied.

In the 1940s, through one of its founders and most significant spokespersons, Dr. W.E.B. DuBois, the NAACP was a moving force in identifying the fundamental links between the problems of racism here in America, and colonialism and human exploitation in Africa, Asia and the Caribbean. The NAACP pressed for the inclusion of human rights concerns in the United Nations Charter during the San Francisco founding conference in 1945. Over the years, the NAACP has been one of the principal non-governmental organizations involved in relentlessly pursuing issues of the denial of human rights.

It is from the aforementioned historical perspective that I come today to affirm and restate the NAACP's commitment to the American Dream of a society rich in diversity and equally open to all.

ENDING RACIAL DISCRIMINATION

Racial discrimination has long been identified as one of the most serious human rights violations by the international community. In fact, equality and non-discrimination in the enjoyment of human rights and fundamental freedoms is at the very heart of international human rights law.[5]

Since the founding of the United Nations, many international conventions and declarations specifically aimed at eliminating racial discrimination have been adopt-

[5] United Nations Human Rights Fact Sheet, 1988.

ed. Among them are the Convention on the Prevention and Punishment of the Crime of Genocide, the Declaration and International Convention on the Elimination of All Forms of Racial Discrimination, the Convention on the Suppression and Punishment of the Crime of Apartheid; the International Labor Organization's convention on Discrimination in Employment and Equal remuneration and the UNESCO Declaration on Race and Racial Prejudice and the Convention against Discrimination in Education.[6]

In June 1993 the United Nations sponsored its second World Conference on Human Rights and the first meeting of this kind since 1968. Held in Vienna, Austria, the Conference was attended by more than 2,000 non-governmental organizations and 160 governments. The participants adopted an insightful program of action that considered the elimination of racism and racial discrimination as a primary objective for the international community in the field of human rights promotion and protection.[7] The final document of that conference included the following:

> Respect for human rights and for fundamental freedoms without distinction of any kind is a fundamental rule of international human rights law. This includes the speedy and comprehensive elimination of all forms of racism and racial discrimination, and xenophobia. Governments should take effective measures to prevent and combat them. Groups, institutions, intergovernmental and non-governmental organizations and individuals are urged to intensify their efforts in cooperating and coordinating their activities against these evils.[8]

The International Convention on the Elimination of All Forms of Racial Discrimination defines racial discrimination as "any distinction, exclusion, or restriction or preference based on race, color, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life." The Convention cites a long list of rights and freedoms in the enjoyment of which racial discrimination is to be prohibited and eliminated, including: the right to inherit; to work; to join trade unions; to housing; and to access to any place or service intended for use by the general public, such as transportation, hotels, restaurants, and parks.

The Race Convention represents the international community's attempt to codify into law new standards to combat racism and racial discrimination. The Convention seeks to challenge States to insist upon equality of rights and provide for the effective prevention of racial discrimination. The Convention expresses legally the values of freedom, justice and equality, originally outlined in the Universal Declaration of Human Rights, which states:

> All human beings are born free and equal in dignity and rights;
>
> Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status;
>
> All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against incitement to such discrimination.[9]

The ratification of the International Convention on The Elimination of All Forms of Racial Discrimination is a progressive step toward expressing the values for which this nation stands. Ratification is also one measure to insure that the promise of America can become a reality for all without distinction as to race, ethnic origin, social status.

The NAACP believes that ratification of the Convention should occur as soon as possible and without unnecessary reservations, understandings, or declarations. We believe this for several reasons.

First, ratification of the Convention would greatly strengthen our national commitment to the elimination of racial barriers to justice and provide stronger legal basis for such elimination. United States anti-discrimination law is compatible to anti-discrimination language of the Race Convention. The Race Convention like the

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[6] United Nations Reference Guide in the Field of Human Rights, United Nations Publications New York, New York, 1993.

[7] United Nations World Conference on Human Rights: The Vienna Declaration and Program of Action, June 1993, p. 49

[8] Ibid, p. 33.

[9] Universal Declaration of Human Rights, Articles 1, 2(1) and 7.

Convention on Civil and Political rights, which was ratified in 1991, prohibits discrimination in any field regulated and protected by the government.

Second, ratification would place the United States in a better position from a position of moral authority, to address some of the more serious manifestations of racial discrimination and the growing problem of racial and ethnic tensions in the international community.

Third, ratification would help to create a new context for discussing the lingering racial problems in this country.

Millions of people around the globe, due to the scientific and technological revolution in telecommunications, saw Rodney King brutally beaten and the rebellion that followed the acquittals. The verdict in the Rodney King trial and the subsequent destruction of much of South-Central Los Angeles shook our nation to its core—58 dead, 4,000 injured, 12,000 arrested, the loss of 40,000 jobs and over $1 billion in damages.[10] The videotaped beating of Rodney King by officers of the Los Angeles Police Department has come to symbolize the very essence of police brutality and official misconduct.

Police brutality has been identified as one of the most pressing human rights violations in this country today by several international human rights organizations. The discriminatory impact of police abuse on members of minority groups, particularly African Americans, violates the prohibitions on discrimination, equal protection and equality before the law.

In the wake of the King beating, the NAACP conducted hearings around the United States on the issue of police brutality and found that the issue of police abuse and racial discrimination cannot be separated.[11] The General Accounting Office reached similar conclusion as they reviewed more than 15,000 cases of police abuse reported to the Justice Department. In fact, their findings showed more than 180 identifiable police departments that displayed patterns of brutality. Police brutality and the racial discrimination associated with it when aimed at national minorities often goes unpunished.[12]

VIOLATIONS OF FUNDAMENTAL RIGHTS

There are those in this country who see racism as a thing of the past. They suggest that racial progress has overcome the difficulties of the past and that current United States law is more than adequate to address the isolated problems that occur. If the current difficulties we are experiencing in our nation in overcoming the legacy of racism are any indication of racial progress, we still have a long way to go. I offer a few examples to make the point clearer.

In the areas of housing, voting rights, employment, immigration, environmental protection, and equality before the law currently the unresolved problems of racial discrimination violate many of the provisions contained in the Race Convention that prohibit systematic racial discrimination.

Racial Discrimination in Housing—As we approach the 21st century, residential segregation is alive and well and prevalent across the United States. African Americans remain racially isolated in this country. A 1991 study by the Population Reference Bureau found that within cities and suburbs, blacks and whites typically live in different neighborhoods, regardless of their income level or poverty status.[13] Indeed, there is little debate that, despite nearly 30 years of congressional, executive and judicial activities aimed at eliminating racial segregation and discrimination in housing, racial minorities continue to face discrimination in their attempts to secure minimally adequate and affordable housing in racially and ethnically-integrated communities.[14]

Housing patterns in this country remain severely segregated on the basis of race and national origin. Millions of African Americans, Latinos and other minorities are locked into segregated neighborhoods which afford few good jobs, inferior schools, and inferior public services. This residence-based denial of educational and employment opportunities drains talent out of the domestic work force and results in increased costs to the social welfare and criminal justice systems.

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[10] "Pull Together?", *The Economist*, vol. 323, May 9, 1992, p. 25.

[11] Beyond the Rodney King Story: NAACP Report on Police Conduct and Community Relations, 1993.

[12] See Joe Davison, "Have Police Declared War on Blacks?" *Emerge* vol. 4, May 31, 1993 p. 27.

[13] "African Americans in the 1990's," *Population Bulletin*, vol. 46, July 1991, p. 9.

[14] Human Rights Violations in the United States: A Report on U.S. Compliance with the International Covenant on Civil and Political Rights. Human Rights Watch and American Civil Liberties Union 1993, pp. 17–21.

Segregation does not occur by chance, income or private choice alone. Persistent patterns of racial segregation have resulted from a host of official actions of federal, state, and local governments and of discriminatory and segregative policies followed by housing, lending and insuring industries. Our segregated and racially-isolated central cities are largely the result of governmental and industry policies.[15]

Racial Discrimination in Protection of Voting Rights—Of all the rights secured under the Constitution, none is more precious than the right to vote. Unfortunately, racial discrimination continues to prevent citizens of the United States from being fairly represented. Statutory prohibitions explicitly barred African Americans from participating in the political process in many parts of the country until 1965. The insidious and systematic racial discrimination in voting also included measures such as physical violence, economic intimidation, literacy tests and poll taxes. The 1965 Voting Rights Act removed many of these legal barriers. However, today

> * * * some jurisdictions created new discriminatory schemes to dilute or cancel the impact of the new minority vote. They made elective posts appointive; created racially gerrymandered election boundaries; instituted majority runoffs to prevent minority victories under prior plurality systems; and substituted at-large elections for elections by single-member districts. Further, in response to the election of minority sponsored officials, recalcitrant local officials have changed governmental rules to prevent minority elected officials from participating equally in the governing process by extending the terms of offices held by white incumbents, abolishing offices sought by African-American candidates, making elective officers appointive in predominantly black counties and limiting or shifting to other bodies the responsibilities of offices held by African-Americans.[16]

In two recent actions, the United States Supreme Court severely restricted the scope and protection of the Voting Rights Act. In *Presley* v. *Etowah County Commission*, 112 S. Ct. 820 (1992), the Supreme Court held that the white majority of a county commission could strip the budgetary authority from the first African American commissioner elected since Reconstruction, making him unable to effectively carry out the functions he was elected to perform. In *Shaw* v. *Reno*, 113 S. Ct. 2816 (1993) the Court ruled that after years of state-sanctioned racial discrimination in voting, redistricting efforts designed to enhance the possibility of minority group electoral representation could be successfully challenged by white voters under the 14th Amendment, even though the voters in question failed to demonstrate an injury.

Also, the NAACP has found an extraordinary lack of enthusiasm and some disturbing trends of resistance towards the implementation of the National Voter Registration Act of 1993, the "Motor-Voter" law, which was passed by the 103rd Congress and signed into law by President Clinton, particularly as it relates to new voting registration opportunities for poor people and racial minorities. The new law is intended, in part, to eliminate vestiges of racial discrimination in voting registration procedures produced by hostile registrars and burdensome voting registration procedures that had the effect of excluding African Americans, among others, from the ballot box.

The new law permits eligible citizens to register to vote when they apply for driver's licenses, welfare or unemployment benefits or use other government services. A pattern has emerged, however, which demonstrates that state legislatures are treating social service agencies differently from motor vehicle bureaus. The preferential treatment towards motor vehicle agencies will have a disparate impact on racial minorities and the poor.

Racially-Motivated Violence—The Committee should also note that random and organized acts of racist violence have been carried out by racist groups across the country. Just last year, for example, two of our branch offices were bombed. We stated then that those acts were connected to a escalating tide of racism and racial

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[15] HUD repeatedly has been held liable for segregation and discrimination in the administration of its own programs. In addition, numerous HUD studies reveal massive discrimination in private housing markets. For example, a 1991 HUD Report of undercover audits of 3,800 homes and apartments in 25 U.S. cities showed that African Americans encountered discrimination 59 percent of the time when they tried to buy a house and 56 percent of the time when they sought rental housing. Latinos suffered discrimination 56 percent of the time they tried to purchase housing and 50 percent of the time they tried to rent.

[16] Human Rights Watch/ACLU report op. cit., pp. 32–33. See also *Robinson* v. *Alabama State Department of Education*, 652 F. Supp. 484 (M.D. Ala. 1987) (transferring control of public schools after passage of the Voting Rights Acts from the Board of Education elected by a 65 percent African American county to a City Council elected by a 52 percent African American city); *Hardy* v. *Wallace*, 603 F. Supp. 174 (N.D. Ala. 1985) (shifting authority of county legislative delegation after the election of two African Americans).

discrimination that threatens not only the NAACP, but all other institutions and individuals who speak out on behalf of racial justice and equality.[17] A few years ago, in Atlanta our Southern Regional Office received a bomb through the mail that could have killed the entire staff. In the same time frame, our Jacksonville, Florida branch office received a mail bomb that jeopardized the lives of NAACP staff and members. Later, NAACP Attorney Robbie Robinson was tragically killed by a mail bomb delivered to his office.

Although state practices of racist violence against people of color have been ruled illegal, individual and selected group practices of racist violence continues to plague people of color in this country.

RESERVATIONS TO THE CONVENTION

In 1979, the NAACP presented testimony before this Committee in support of the ratification of the International Convention on Civil and Political Rights, the International Convention on Economic, Social and Cultural Rights and the International Convention on the Elimination of All Forms of Racial Discrimination because we believed then and now that a strong human rights policy is vital to the preservation of world peace and that our country's viability and credibility as a respected leader in the international community can be enhanced significantly.

The NAACP does have some deep concerns about the Administration's reservations, understandings and declarations. We agree with the International Human Rights Law Group and other respected human rights organizations, that ratification will serve both the international and domestic policy interest of the United States. However, ratification of a document that has been robbed of its central value makes little sense. Therefore, the NAACP's concerns center on the non self-executing declaration and freedom of speech, expression and association.

The Administration's declaration that the provisions of the Race Convention are not self-executing in many ways resembles the changes we spoke of in the voting rights context in certain states when racial minorities began to achieve a measure of political power, the rules of the game may change. If the obligations embodied in the Convention are in compliance with the principles and obligations set out in the United States Constitution, and federal and state legislation then the proposed declaration is unnecessary. Moreover, this device if accepted will deny large sections of the American people "the protection of international human rights law as a supplement and backstop to constitutional protections."

The NAACP believes that the non-self executing language should be removed as a declaration proposed by the Clinton Administration.

One of the main difficulties for the United States with the Convention has been that it appears to some to restrict freedom of speech by Article 4 which requires States to outlaw racist speech and organizations. Let me state in the clearest terms that the NAACP supports free speech, expression and the right of association. Clearly there would have been no civil rights movement, with its emphasis on organizing for the redress of grievances, without the constitutional protection of the First Amendment. At the same time, we recognize the ability of a State to regulate *actions* which seek to intimidate or cause harm.

CONCLUSION

We believe that failure to ratify this treaty, would be a tragic mistake.

It is clear that racial discrimination is a persistent thread running through the garment of the American experience and that racism is deeply rooted in the history of our nation.

Moreover, we living at critical moment in human history, a time when leadership in the international community has fallen on the shoulders of the United States for a number of reasons. Our world is ravaged by growing racial and ethnic tensions. The NAACP believes that the promotion and protection of human rights is key to solving many of these problems.

Unfortunately, in the matter of ratification of human rights treaties generally and the Convention on the Elimination of All Forms of Racial Discrimination in particular our nation is not leading the way, but instead is pulling up the rear. Over 130 other countries have already acceded to the Race Convention.

Let us not go into the next century having left unratified this effort to set an international standard against racial discrimination. The protection of human rights must be maintained by one single standard. Racial discrimination will not disappear because it is morally wrong. Racial discrimination will only disappear in the face

[17] "Communities Unite Behind Bombings: City Leaders Offer Reward for Assailants." Sacramento Observer v. 30, N. 46, October 7, 1993, p. A1.

of full equality of opportunity, and through the conscious efforts of persons of good will who strive to achieve a broad respect for human rights.

The CHAIRMAN. Thank you very much.

We now turn to Mr. Lake, a partner at Wilmer, Cutler & Pickering, and a member of the board of directors of the International Human Rights Group. Mr. Lake.

STATEMENT OF WILLIAM T. LAKE, PARTNER AT WILMER, CUTLER & PICKERING, MEMBER OF THE BOARD OF DIRECTORS OF THE INTERNATIONAL HUMAN RIGHTS LAW GROUP

Mr. LAKE. Thank you, Mr. Chairman.

I am very pleased to be able to be here today on behalf of the law group, which, as you know, is a leading human rights advocacy organization, and puts a very high priority on U.S. adherence to this Convention.

We welcome the President's move to support ratification, and we commend this committee for acting so quickly to schedule hearings. But we are very troubled by a number of the qualifications that the administration has attached to its proposal.

We think they are unnecessary and that they invite the criticism that U.S. adherence to this treaty may be nothing more than window dressing.

We are especially concerned about the administration's proposed declaration that the treaty is nonself-executing. We recognize that the United States has made similar declarations very recently in ratifying two other human rights treaties, and it is likely that the United States will follow that pattern here. But we find the pattern very unfortunate.

This will be yet another example of the United States refusing to let its own citizens enforce rights under a treaty in its own courts.

In our foreign policy efforts, America very often urges that internationally recognized human rights be enforceable through national organs of government, especially the courts, in order to strengthen democracy in respect for rights abroad.

When we then undertake an obligation internationally, but deny it any legal effect in our own courts, we send a message that the United States is afraid to practice what it preaches.

It is especially sad to send that message with respect to this treaty in particular, whose obligations mirror almost identically to protections already found in U.S. law.

We urge the committee to consider two things in regard to a nonself-executing declaration. First, the declaration would not absolve the United States of its duty under international law to ensure that our domestic laws comply with the treaty. It would merely seek to deny the courts a role in fulfilling that duty.

Second, it is not clear what legal effect such a declaration would have. As we understand the law, and we have reviewed it in the paper that we submitted, the courts will finally determine what provisions of this treaty are self-executing.

A declaration on that subject would only be legislative history, and could not overcome the language of the treaty itself.

The harm from such a declaration would be compounded by the administration's proposal to exempt the United States from the ju-

risdiction of the International Court of Justice over interstate disputes under the Convention.

The administration has said that it considers it prudent to retain the right to decline a frivolous case that might be brought solely to embarrass us.

But the role of the World Court is an integral part of the interstate complaint procedure under the treaty. Any frivolous cases are likely to be exposed at earlier stages of that procedure.

History has shown that interstate human rights complaint procedures have not been overused. In fact, as has been noted, the one in this treaty has never been invoked.

So our refusal to accept that mechanism would needlessly suggest to other signatories that we are afraid to subject our practices to the scrutiny that the treaty provides for, and that most of the other countries have accepted.

The argument against such a reservation was put very well by Secretary Christopher in his nomination hearings before this committee.

He said, "In the International Court of Justice, our refusing to cede or grant jurisdiction, our retaining the right of unilateral withdrawal, is one of those things that sets back the entire enterprise. If the leading Nation in the world feels that when it does not want to risk a bad outcome it simply picks up its marbles and goes home, that is a very unsatisfactory result."

We think the Secretary was right then, and that the administration is wrong now in proposing this reservation.

The third nail in this coffin is the administration's proposed reservation on discrimination in private conduct. Under that reservation, the United States would expressly deny any obligation to control private discrimination, except where we are already required to control it under the Constitution and existing laws.

The administration has recognized that this treaty makes the same distinction that U.S. law does between discrimination in public life, which should be forbidden, and strictly private actions that are left to individual conscience.

So a reservation is not needed to ensure that the treaty will leave undisturbed that important feature of our law. But the reservation would telegraph to the world that if there is even the slightest respect in which this treaty goes beyond our present law, we refuse any obligation to take that additional step.

We ask the committee to think what that would say to the many other countries whose present laws are much less protective than ours.

Our main purpose of a treaty such as this is to require each party to bring its practices up to the common floor that the treaty proscribes. If the United States says we refuse to let this treaty change our law in any respect, we cannot expect much success when we push to have the treaty do exactly that to the laws of other countries.

In conclusion, we, too, of course, urge the committee to report favorably on ratification, and because U.S. law so closely mirrors the requirements of this treaty, we hope that the committee will take this opportunity to show that the United States does not need to hobble its ratification with self-defeating qualifications.

Thank you very much, Mr. Chairman.
The CHAIRMAN. Thank you very much.
[The prepared statement of Mr. Lake follows:]

PREPARED STATEMENT OF MR. LAKE

Mr. Chairman and members of the Committee, I am William Lake, a partner in the law firm of Wilmer, Cutler & Pickering in Washington, D.C. I am appearing today on behalf of the International Human Rights Law Group, on whose Board of Directors I serve. The Law Group is a leading human rights advocacy group and puts a high priority on U.S. ratification of this Convention. I will summarize my prepared statement and ask that the statement be included in the record.

The Law Group welcomes President Clinton's move in support of ratification of the Convention, but urges the Senate to set aside the majority of the qualifications to the Administration's proposal. We believe that most of the qualifications are unnecessary or undesirable. In particular, we strongly oppose the Administration's declaration that the Convention is non-self-executing. We recognize that the United States declared the Torture Convention and the International Covenant on Civil and Political Rights to be non-self-executing, and it is likely to do the same here. If you accept this declaration, it will be yet another example of the United States refusing to let its own citizens enforce rights under the treaty in their own courts. In our foreign policy efforts, we urge—at times demand—enforcement of internationally recognized human rights through national agents of government—*especially* the judiciary—to strengthen democratization and human rights respect abroad. Given that the overwhelming majority of the treaty's obligations parallel legal protections already covered under U.S. law, of what are we afraid? By undertaking an obligation internationally that has no legal effect within the courts of our own nation, the United States opens itself to the justifiable accusation that its method of treaty ratification is little more than "window-dressing."

In addition, we urge the Committee to consider two things in regard to a non-self-executing declaration. First, the declaration would not absolve the United States of its duty under international law to ensure that its domestic laws comply with the Convention. The declaration merely seeks to deny the courts a role in fulfilling that duty. The declaration could delay the impact of the treaty's provisions in the United States and necessitate the enactment of legislation that would not otherwise be needed. Second, it is not clear what legal effect the declaration would have. As we understand the law, the determination of which provisions of the Convention are self-executing will ultimately be made by the U.S. courts, and a declaration on that subject would only be legislative history, which could not overcome the language of the treaty itself.

A second issue of concern to the Law Group is the Administration's proposed reservation regarding discrimination in private conduct that falls beyond what the U.S. Constitution and laws require. We do not believe such a reservation is necessary and, indeed, we find it unfortunate. Article 1(1) of the Convention defines racial discrimination by reference to the "political, economic, social, cultural, or any other field of public life." As such it appears to recognize, as does U.S. law, that some areas of private activity fall beyond the reach of nondiscrimination obligations. It is reasonable to interpret the term "public life" to be consistent with the lines drawn by our law between activities that are and are not subject to nondiscrimination laws. We think that, at the most, an understanding should suffice to address the Administration's concerns regarding this issue, and we suggest language in our full analysis submitted for the record.

We also oppose the Administration's proposal to exempt the United States from the jurisdiction of the International Court of Justice on an *ad hoc* basis in the event of referral of inter-state disputes under Article 22 of the Convention. The Administration believes that it is prudent for the United States to retain the ability to decline a "frivolous" case that might be brought by countries at odds with U.S. policies. We believe that the role of the World Court as the final arbiter of disputes under this Convention is an integral part of the inter-state complaint procedure. Not only are frivolous cases likely to be exposed at earlier stages of the complaint procedure, but history shows that this and other inter-state human rights complaint procedures have not been overused. The Administration's proposal would undermine the enforcement mechanisms established under the treaty by removing from the process the binding recourse of last resort. Indeed, in his nomination hearings before this Committee, Secretary of State Warren Christopher expressed his opposition to reservations with respect to provisions that require compulsory submissions to the Court's jurisdiction, stating that:

> In the International Court of Justice, our refusing to [cede] or grant jurisdiction, our retaining the right of unilateral withdrawal, is one of those things that sets back the entire enterprise. If the leading nation in the world feels that when it does not want to risk a bad outcome, it simply picks up its marbles and goes home, that's a very unsatisfactory result * * *. But I think the United States as the leading power in the world now has special responsibilities that we ought to undertake to carry out.[1]

We agree with the Secretary's statement and oppose the reservation proposed by the Administration.

The Law Group also disagrees with the proposed understanding on the issue of federalism. The Administration believes that certain provisions of the Convention [Articles 2(1)(a), 2(1)(c), 4(c), 6, and 7] can be construed to obligate the federal government to take steps that are inconsistent with our federal system. We think that an understanding is unnecessary in light of U.S. constitutional law and federal antidiscrimination laws. The federal government possesses broad powers to prevent discrimination committed by individuals or government entities. The extensive legislation adopted under those powers provides a comprehensive set of rights and remedies for national and local conduct that would violate the Convention. It should suffice to state for the record that the United States will fulfill its obligations under the Convention through means that are appropriate to its federal system of government.

We do support one important reservation in the Administration's package—the reservation to Articles 4(a), 4(b), and 7, on freedom of speech, association, and expression. Because Articles 4(a) and 4(b) cannot be squared with the First Amendment, a reservation is necessary. Although we would prefer to see a reservation tailored to Articles 4(a) and 4(b), we accept the broader wording of the Administration.

Finally, I will mention two issues of concern to the Administration, namely affirmative action and *de facto* discriminatory effect. The issue of affirmative action is the subject of a proposed statement in the record by the Administration. It relates to Articles 1(4) and 2(2) of the Convention. Article 1(4) explicitly excludes from the definition of racial discrimination "special measures" taken for the sole purpose of ensuring individuals the equal enjoyment of rights free from racial discrimination. It is broad enough to cover affirmative action programs already implemented, or likely to be implemented, in the United States and therefore would not affect U.S. law. Article 2(2) obligates States Parties, "when the circumstances so warrant," to take special and concrete steps to ensure the equal development and integration of all racial groups within the society. Because that obligation to take affirmative measures is qualified by the phrase "when the circumstances so warrant," the United States retains the discretion to determine *in food faith* whether any special measures are necessary. Thus, we do not oppose the proposed statement.

The issue of *de facto* discriminatory effect is also the subject of a proposed statement in the record by the Administration. Article 1(1) of the Convention establishes that a distinction is contrary to the Convention if it has either the "purpose or effect" of denying individuals particular rights and freedoms on racial grounds. In accordance with the "effects" portion of this definition, Article 2(1)(c) obligates States Parties to nullify any law or practice which has the *effect* of creating or perpetuating racial discrimination. The "effects" language of Articles 1(1) and 2(1)(c) imposes a duty on States Parties to review and revise laws and regulations that prove to have a racially discriminatory effect contrary to the Convention, but only where such effect is not justifiable. Where the criteria for differentiation are "legitimate," the law or regulation at issue will not be considered contrary to the Convention. This view is consistent with the standards applied in disparate impact analysis under U.S. law. Indeed, the Administration has determined that U.S. law satisfies the obligations created by these provisions. We endorse the Administration's proposed statement in the record on this issue.

In conclusion, U.S. ratification of the Convention is long overdue. Ratification will give the United States an effective tool to influence actively the long-suppressed ethnic conflicts reemerging throughout the world. The peaceful transfer of power we have just witnessed in South Africa is a hopeful sign that such hostilities can be held in check through effective statesmanship. However, the events in Bosnia and Rwanda remind us how devastating and destabilizing ethnic hostilities can be.

U.S. efforts to maintain peace in this new environment must include U.S. leadership in promoting respect for the right of individuals to live free from discriminatory

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[1] *Nomination of Warren M. Christopher to be Secretary of State: Hearing Before the Committee on Foreign Relations United States Senate*, 103d Cong., 1st Sess. 72–73 (1993) (statement of Warren M. Christopher, Nominee, Secretary of State).

treatment based on race or ethnic origin both at home and abroad. That leadership requires an unqualified ratification of internationally recognized obligations to ensure freedoms from racial discrimination within the parameters of our Constitution. President Clinton's initiative in renewing the call for ratification provides an opportunity to take that step. By wholeheartedly joining the 138 countries that have already ratified the treaty, we can throw our weight behind an international commitment to the eradication of all forms of racial discrimination. Because the Convention so closely mirrors U.S. antidiscrimination laws, we urge the Committee to report favorably on ratification without unnecessary delay.

Thank you, Mr. Chairman.

[Other material submitted by Mr. Lake may be found in committee files.]

The CHAIRMAN. We now turn to Dr. Robert Henderson, secretary general of the National Spiritual Assembly of the Baha'is of the United States.

Senator KERRY. Mr. Chairman, if I could just beg your indulgence?

The CHAIRMAN. Yes.

Senator KERRY. I apologize for not being able to be here for the full time, and for interrupting. But I just wanted to say on the record that—I interrupted a meeting to come down here.

I wanted to first of all congratulate you and thank you for having this hearing. Ratification of this treaty is long overdue. We have had a barren period of years when two Republican administrations did not believe in it. We are now back to the reservations that essentially were suggested by the Carter administration.

I understand the reservations. I also understand the arguments Mr. Lake and others make, but I think that they are essential to our ability to move forward, and we have to recognize that, and understand the dynamics.

I also want to pay tribute to Father Drinan. I am not surprised that he is here testifying on this, and I really want to celebrate his long commitment to these issues.

He is one of the great leaders on human rights in Massachusetts, was one of the most outspoken people in Congress when he came here on issues of war and peace, and human rights, and the example of the United States, and I am just delighted that you are here testifying today.

Father DRINAN. Thank you very much, Senator.

Mr. Chairman, if I may just interject that I am lobbying my own Senator today, and saying that the American Bar Association approves the Racial Justice Act on which you vote later today. And I am certain that your vote will be the correct one. [Laughter.]

Senator KERRY. It will, indeed. [Laughter.]

I am glad they outlawed gifts from lobbyists, personally, because I am not sure whether to take that as a gift or——

[Laughter.]

Senator KERRY. But I accept it.

Father DRINAN. Thank you.

The CHAIRMAN. Dr. Henderson, would you proceed?

STATEMENT OF DR. ROBERT C. HENDERSON, SECRETARY GENERAL, NATIONAL SPIRITUAL ASSEMBLY OF THE BAHA'IS OF THE UNITED STATES

Dr. HENDERSON. Thank you very much, Mr. Chairman.

I am privileged to represent the American Baha'i community, which is coincidentally celebrating the centenary of its establish-

ment in this country, and has for the past 100 years championed the principle of the unity and oneness of the human family, and the unity of the races. And I am also very pleased to present this statement for the record.

Racism is the most challenging issue confronting America. It is an insult to human dignity, a cause of hatred and division, a disease that devastates society.

The National Spiritual Assembly of the Baha'is of the United States unequivocally supports the ratification by the United States of the International Convention on the Elimination of All Forms of Racial Discrimination.

The proposal for a specialized convention on racial discrimination was a result of incidents of anti-Semitism in Western Europe during the winter of 1960, and of memories of the Holocaust.

Moreover, the newly independent African states were concerned about racial discrimination on their own continent and in North America. Today, racial and ethnic conflagrations have exploded once again in the heart of Europe and of Africa, underscoring the need for international response.

The Convention, which was signed by the United States in 1966, provides a definition, a legal definition, of racial discrimination. Some 30 years after the signing, the laws of the United States largely comply with the Convention.

Ratification by the United States is still essential to demonstrate to the world this country's commitment to the elimination of racial discrimination and to the resolution of racial and ethnic conflicts both here and abroad.

Only 2 years ago we watched in horror the violence and fires in Los Angeles. America's peace, prosperity, and even her standing in the international community largely depend on healing the wounds of racism and building a society in which all people, irrespective of color, ethnicity, national origin, or religion live as members of one family.

Long-term solutions to ethnic and racial conflicts require a comprehensive vision of a global society, supported by international law, which should not be viewed as a constraint on the nation-state or a threat to its sovereignty, but as a foundation for the next phase of the world's political development.

The United States, faithful to its well-established tradition of concern for world peace and human rights, must continue to play a leading role in defining and building the international legal order.

Active participation by the United States is another important step in building structures and mechanisms that are necessary for the emergence of a truly new, just, and peaceful world order.

Baha'is anticipate the establishment of a world commonwealth in which all nations, races, creeds, and classes are closely and permanently united, and in which the autonomy of its state members and the personal freedom and initiative of the individuals that composed them are definitely and completely safeguarded. America must continue to play a leading part in this historic endeavor.

Thank you.

The CHAIRMAN. Thank you very much, indeed.

[The prepared statement of Dr. Henderson follows:]

PREPARED STATEMENT OF DR. HENDERSON

Racism is the most challenging issue confronting America. It is an insult to human dignity, a cause of hatred and division, a disease that devastates society. The National Spiritual Assembly of the Baha'is of the United States unequivocally supports the ratification by the United States of the International Convention on the Elimination of All Forms of Racial Discrimination.

The proposal for a specialized convention on racial discrimination was a result of incidents of anti-Semitism in Western Europe during the winter of 1960 and of memories of the Holocaust. Moreover, the newly-independent African states were concerned about racial discrimination on their own continent and in North America. Today racial and ethnic conflagrations have exploded once again in the heart of Europe and of Africa underscoring the need for international response.

The Convention, which was signed by the United States in 1966, provides a legal definition of "racial discrimination." Some thirty years after the signing, the laws of the United States largely comply with the Convention. Ratification by the United States is still essential to demonstrate to the world this country's commitment to the elimination of racial discrimination and to the resolution of racial and ethnic conflicts both here and abroad.

Only two years ago we watched in horror the violence and fires in Los Angeles. America's peace, prosperity, and even her standing in the international community, largely depend on healing the wounds of racism and building a society in which all people irrespective of color, ethnicity, national origin, or religion live as members of one family.

Long-term solutions to ethnic and racial conflicts require a comprehensive vision of a global society, supported by international law, which should not be viewed as a constraint on the nation-state or a threat to its sovereignty but as a foundation for the next phase of the world's political development. The United States, faithful to its well established tradition of concern for world peace and human rights, must continue to play a leading role in defining and building the international legal order.

Active participation by the United States is another important step in building structures and mechanisms that are necessary for the emergence of a truly new, just, and peaceful world order. Baha'is anticipate the "establishment of a world commonwealth in which all nations, races, creeds and classes are closely and permanently united, and in which the autonomy of its state members and the personal freedom and initiative of the individuals that compose them are definitely and completely safeguarded." America must continue to play a leading part in this historic endeavor.

The CHAIRMAN. Now, I would like to ask you what would be the impact of not ratifying the treaty at this time? First, I would ask Mr. Henderson, and ask each one of you.

Mr. HENDERSON. Mr. Chairman, the NAACP believes strongly that this Convention needs ratification and needs it now, and that the delay in consideration is detrimental both to our domestic concerns about harmony among the races, and developing greater tolerance, which is key to advancing our own society as we move into the 21st century.

And second, we believe that it sends a very negative signal to emerging democracies throughout the world and to countries that are struggling with the shackles of previous political constraint in trying to advance democratic principles which we support.

Were the United States to consider ratification of this treaty, as we are now doing, and choose to reject that ratification, we think it sends a very detrimental and negative statement to the world at large, and we think it fatally compromises the likelihood that this Convention will ever advance to complete ratification. So we think it is essential to move forward.

The CHAIRMAN. Mr. Lake?

Mr. LAKE. Mr. Chairman, I would agree with that. I think, as Mr. Shattuck said earlier, it cripples the participation by the United States in any international human rights convocation for us to have the embarrassment of not being a member of this treaty.

And at a more practical level of interest to a lawyer, it prevents us from participating in the U.N. human rights structure that the United States helped to create, but which it is disqualified from participating in, the committee, in any further proceedings, in any conciliation commission, because we have to be a member of the treaty in order to participate in those endeavors.

So we are missing the opportunity to contribute constructively to the development of international law on this subject.

The CHAIRMAN. Thank you.

Father Drinan?

Father DRINAN. I think, Mr. Chairman, that the United States is denying its own minority peoples the right that they have under international law. The monitoring committee on the Race Convention is more and more active.

A splendid document just came out indicating all that they have done through all the years. We are losing the opportunity, both to be there and to criticize, and also to be criticized.

And I think that worldwide criticism of what we are doing is a right that the people of America should have under the law.

The CHAIRMAN. Would I be correct in saying that each one of you believe it is better to pass the treaty as is, with the proposed reservations, understanding, and declaration than not to pass it at all? Would that be correct, Mr. Lake?

Mr. LAKE. Yes, it is, Mr. Chairman.

The CHAIRMAN. Mr. Henderson?

Mr. HENDERSON. Yes. That is the law group's position.

The CHAIRMAN. Dr. Henderson?

Dr. HENDERSON. Mr. Chairman, if I may also add to your earlier question, we believe that racism is not only the most challenging issue confronting America, but it is epidemic worldwide.

We face an unprecedented number of global issues. This is the most fundamental, because with cooperative international effort, to foster unity among the diverse peoples of the world within every nation, we lay the foundation for the kind of cooperation that will be indispensable to confronting the global agenda.

Without this kind of resolution, without the elimination of racial and ethnic conflict, we will simply preside over the dissolution of our own country and others.

We must heal the wounds of racial division and conflict in order to have the kind of cohesive nation that can make an increasingly substantive contribution to the global problems we face as a world.

The CHAIRMAN. I would like to ask you: Do you think there are any laws or regulations that we will have to pass in order to be in compliance with the treaty?

Mr. Henderson?

Mr. HENDERSON. No, Mr. Chairman. I believe for the most part that Federal and State laws are fully consistent with the requirements of the Convention, and we believe that if the United States were to adopt the Convention in its present form it would be in virtual full compliance.

The CHAIRMAN. Thank you.

Mr. HENDERSON. So we do not think new laws are required.

The CHAIRMAN. Mr. Lake?

Mr. LAKE. We think that with the one reservation that we support, with respect to the first amendment, this treaty could be enacted and be entirely consistent with existing U.S. law.

The CHAIRMAN. But you do feel that legislation would have to be passed in accordance with the first amendment.

Mr. LAKE. Excuse me. No. We think no legislation would be necessary in order to conform U.S. law with this treaty. And the reservation that the administration has proposed on the first amendment will take care of the first amendment issue.

The CHAIRMAN. Thank you.

Father Drinan?

Father DRINAN. Mr. Chairman, even if it is not self-executing, it forms another source of law that judges and commissioners can follow. So I think it strengthens all of the law in America.

The CHAIRMAN. Dr. Henderson?

Dr. HENDERSON. Mr. Chairman, I think that we need to see the law as the first step, because law alone is essential, but not sufficient to transform the spirit and character of the citizens of our Nation.

We think that the law must be passed, but we hope that it will be a reinforcement of an increasing effort to move us in the direction of the unity of the races in this Nation and around the world.

The CHAIRMAN. Understood. But am I correct in saying that we would not have to pass any laws or regulations to be in compliance with this treaty?

Dr. HENDERSON. We think that there is already a large body of law that is in compliance with the Convention.

The CHAIRMAN. OK. Thank you. Thank you very much, indeed, for being with us and for offering your testimony. Your statements will appear in full in the record.

The record will stay open through the week for any further questions.

And I want to insert into the record a variety of statements from interested public groups on ratification of the Convention. Without objection they will be put into the record. Most of them, I am advised by staff, are positive.

[The information referred to may be found in committee files.]

The CHAIRMAN. Thank you very much. The committee is adjourned.

[Whereupon, at 11:15 a.m., the committee adjourned, to reconvene subject to the call of the Chair.]

APPENDIX

PREPARED STATEMENT OF THE AMERICAN CIVIL LIBERTIES UNION

INTRODUCTION

The American Civil Liberties Union (ACLU) welcomes this opportunity to express its strong support for immediate ratification of the International Convention on the Elimination of All Forms of Racial Discrimination ("CERD"), provided that the Senate adopts the Administration's proposed reservation on Freedom of Speech, Expression, and Association. This reservation is necessary to ensure that the Convention does not lead to a reduction of liberty in the United States.

Since its founding nearly 75 years ago, the ACLU has been working to end racial discrimination in the United States and to secure the rights guaranteed by the Convention. International human rights are an extension of our national priorities. Active and expressed support for international human rights by the United States government further legitimizes and otherwise strengthens the values of civil liberties and civil rights in the U.S., as well as in the rest of the world.

The ACLU believes that all persons in the United States should be guaranteed the full range of rights embodied in the Convention. Thus, we oppose the proposed declaration that the Convention be non-self-executing. This declaration may undermine the promises made by ratifying the Convention, and tries to make the rights guaranteed by the Convention and create paper "rights" without any remedies.

The ACLU believes that the proposed reservation on "Private Conduct" should be more narrowly drafted to assure that the Convention's mandate to eradicate discrimination is enforced up to the limits of the U.S. Constitution. Finally, we believe that Article 1(4) of the Convention adequately protects the United State's affirmative action programs.

The U.S. can make a positive contribution to the promotion of the Convention's objectives based on our long experience in battling racial discrimination. Without ratification, U.S. authority in these matters lacks credibility due to our failure to formally embrace the internationally accepted minimum standards ourselves. With ratification, the U.S. would be able to participate in the work of the Committee on the Elimination of Racial Discrimination, a body of 18 experts elected by the parties to the Convention. The Committee monitors the implementation of the convention based in large part on reports made to it by the parties. United States ratification of the Convention would enable us to play a large role in the interpretation of these reports, the Convention, and contribute our unique experience to developing international expertise on the elimination of racial discrimination.

Human rights are no longer a matter of any state's domestic jurisdiction. ACLU members share the revulsion of all the American people at the slaughter in Haiti, Rwanda, Bosnia, and other places where racial and ethnic tensions have lead to human rights atrocities. These atrocities have an obvious impact on Americans. Participation in the Convention by the United States may help contribute to a long term solution of these problems.

The Convention to End Racial Discrimination is an expression of the value system of the United States. Its provisions are consistent with, and a projection of, our democratic values. The more firmly those values can be embedded in international law and values, the better off we will be as a democracy. Roger Baldwin, a founding member of the ACLU, eloquently expressed this position 15 years ago before this same body:

> "The United States has been a leader in this movement in the United Nations and in the world. We are morally, if not legally, committed to this movement. Today our leadership should lead us to take the next step. The next step * * * is the ratification of this codification into a law of human rights, and a wide range of human rights.* * *
>
> "Law will give us the opportunity to influence other nations. It will give us fora * * * in which we can confront our opponents and hopefully prevail with

the intentions that have made the United States a leader in the world in the field of human rights."

THE ACLU'S POSITION ON THE ADMINISTRATION'S RESERVATIONS AND DECLARATION

As noted above, the ACLU's view of the reservations and declaration proposed by the Administration is differentiated. On the one hand, we strongly support the formal reservation on free speech. On the other hand, we strongly oppose the non-self-executing declaration. We feel that the reservation regarding private conduct should be narrowed so that the Convention is effective up to the limits of the U.S. Constitution. And we believe that Article 1(4) adequately protects and allows for the extension, where necessary, of our domestic affirmative action programs.

The Freedom of Speech Expression and Association Reservation

The ACLU supports the Administration's proposed reservation on Freedom of Speech, Expression, and Association. We agree that certain provisions of the Convention are at odds with the First Amendment, and thus the proposed reservation is required.

Article 4 of the Convention requires States parties to punish "all dissemination of ideas based on racial superiority or hatred" and to prohibit organizations "which promote and incite racial discrimination." This Article also mandates the prohibition of organizations that incite racial discrimination.

The ACLU understands why the Convention might include such a provision limiting racist expression. Many of our members have felt the sting of racial slurs. However, the ACLU believes that hateful and/or controversial speech should be countered with reason, consideration, and debate—not government prohibition. The vast majority of Americans treasure the right to freely express themselves, and our political tradition revolves around it. The decisions of the U.S. Supreme Court are in accord.[1] Thus, Article 4 goes beyond what our First Amendment, our traditions, and our jurisprudence allows.

Declaration That Convention is Non-Self-Executing

The ACLU strongly opposes the proposed declaration regarding the Convention's non-self-executing status in relation to domestic U.S. law. The effect of the declaration would be to delay the impact of the Convention in the U.S. and to necessitate the enactment of domestic legislation that would not otherwise be necessary. We believe that the Convention's protections against all forms of racial discrimination should be immediately enforceable in U.S. Courts.

Declaring the Convention non-self-executing also undermines the spirit of Article VI, cl. 2 of the U.S. Constitution. This clause makes ratified treaties the supreme law of the land, "equivalent to a federal statute." The determination whether or not a Treaty or provision thereof is self-executing traditionally has been left to the judiciary. Rarely, and only in recent years, has the Senate ratified a Treaty containing language to the effect that it is not self-executing. In contrast, the Administration, through its declaration, is seeking to deprive the courts of the opportunity to use those provisions of the covenant which might be deemed self-executing to expand individual rights. More generally, in its attempt to strip the Convention of any enforceability in our country, the administration casts serious doubts on its readiness to be bound by its terms. The proper course is for the judiciary to decide, article by article, which aspects of CERD can be invoked by an aggrieved individual.

The Reservation Regarding Private Conduct

The ACLU believes that certain areas of private conduct are protected from governmental interference by the Constitution. The Convention recognizes the difference between state action and private conduct by defining racial discrimination in Article 1(1) as affecting the "human rights and fundamental freedoms in the political, economic, social, cultural or any other fields of public life." The words "public life" can be read to mandate state action only in the public realm, and not unwarranted interference with private action.

The Administration's reservation concerning Private Conduct attempts to amplify the Convention's application to state action. The reservation explicitly limits government regulation of private discriminatory conduct to the extent "mandated by the Constitution *and laws of the United States.*" (Emphasis added). By limiting anti-discrimination regulation to existing U.S. law, however, the reservation severely limits the application of the Convention, and does nothing to nudge the U.S. to fight discrimination up to the limits of the Constitution.

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[1] *See e.g. R.A.V.* v. *City of St. Paul,* 112 S.Ct. 2538 (1992).

The reservation, we believe, could be better written by eliminating the words "and laws of the United States." In the alternative, the reservation could be written to express the U.S. interpretation of the term "public life" in Article 1(1) as consistent with Supreme Court interpretations of what constitutes regulable state action.

The ACLU certainly agrees that the Convention should not be used as the basis for extending the reach of government regulation to end discrimination beyond that which is allowed by the Constitution. There are a number of areas, though, in which the Constitution would allow governmental regulation for which U.S. law inadequately provides. As the purpose of the Convention is to end racial discrimination, the reservation as written senselessly means that we will only do that which we have already done to end discrimination.

Affirmative Action

The ACLU believes the Convention acknowledges that affirmative action programs are necessary in some situations. Article 1(4) specifically excludes from the definition of "racial discrimination" specific measures taken for the sole purpose of securing adequate advancement of certain racial groups requiring such protection. Further, Article 2(2) allows for parties to take special and concrete measures for the adequate development and protection of certain racial groups to ensure them the full and equal enjoyment of human rights.

We believe that Article 1(4) exclusion of "special measures" is broad enough to cover the types of affirmative action programs that have been implemented here. We agree with the administration that "the convention does not impose any obligation which would prevent or require adoption and implementation of appropriately-formulated affirmative action measures that are otherwise consistent with U.S. constitutional and statutory provisions."[2]

CONCLUSION

The ACLU urges the immediate ratification of the Convention, with the proposed reservation concerning Freedom of Speech, Expression, and Association. The Convention represents a significant advancement for people living around the world. In some respects, the Convention surpasses our own realizations. These should inspire us to move forward in the protection and expansion of our civil rights and liberties.

PREPARED STATEMENT OF AMNESTY INTERNATIONAL USA

Amnesty International USA welcomes the opportunity to submit testimony on the occasion of hearings before the Senate Foreign Relations Committee on the question of U.S. ratification of the International Convention on the Elimination of All Forms of Racial Discrimination (Race Convention). We commend the Chairman of this Committee, Senator Claiborne Pell, for scheduling these hearings, and we look forward to working with him and members of this Committee for a favorable vote in the Senate on the question of U.S. ratification of this Convention.

It is of particular importance in these times that the Senate Foreign Relations Committee and the full Senate consider the role that the United States can play in addressing the effects of racism and ethnocentrism that plague our world today. From Bosnia to Somalia, from Nagorno-Kharabakh to Rwanda, we see the horrendous impact of strife based in part on differences in race, ethnicity or nationality. In our own country, we are still struggling with the vestiges of a system of race relations that had their origins in slavery. We also look with hope to the country of South Africa, which after so long a struggle, has set itself on a path of positive and constructive relationship between races and ethnic groups in the new political order of that country.

It is well beyond the time that the United States should have ratified this Convention, first adopted by the United Nations in 1965. But it is an important time for the United States to take that step now. Ratification of this treaty at this time can stand as a statement of intention on the part of the United States to strengthen the international community in its efforts to address the cancer of discrimination. It can also stand as a necessary reaffirmation of the stated goals of this country in its Constitution, its laws and its policies at the federal and local levels that all U.S. citizens and residents be treated equally.

As an organization that works for the individual, whether he or she is a prisoner of conscience, a victim/survivor of torture, a political prisoner facing an unfair trial or arbitrarily detained, or a prisoner facing the death penalty, we are all too aware

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[2] *See* Statement of the Clinton Administration's Proposed Reservations, Declaration and Understanding 14 (Apr. 26, 1994), p. 19.

that the fundamental human rights of the citizens of this world are all too often violated by the very governments sworn to protect and promote those rights. We recognize in this Convention to Eliminate All Forms of Racial Discrimination one of the building blocks in a structure of international law and policy that recognizes that these fundamental human rights belong to each and every human person regardless of racial, ethnic or national background.

Because of the importance we place on building international structures for the promotion and protection of human rights we are particularly disturbed by the reservation to the jurisdiction of the International Court of Justice (ICJ) that is proposed in the Clinton Administration's package of reservations, understandings and declarations submitted to the Senate on April 26, 1994 ("3. Reservation: Dispute Settlement").

It is time for the United States to change its attitude to the ICJ. We had hoped that would be the case, based on remarks made by Warren Christopher in his confirmations hearings in January 1993 where he said:

> In the International Court of Justice, our refusing to cede or grant jurisdiction, our retaining the right of unilateral withdrawal, is one of the things that sets back the entire enterprise. If the leading nation in the world feels that when it doesn't want to risk a bad outcome, it simply picks up its marbles and goes home, that's a very unsatisfactory result.* * *

Therefore, we were disappointed to see that this reservations survived debate within the Clinton Administration. The Senate should delete this reservation in its deliberations on the package the Clinton Administration proposed.

In designing a proposed package of reservations, understandings and declarations, the administration looks to the Senate and designs a package that it believes the Senate will accept. Once the package is proposed, the Senate then gives it weight in its own deliberations. Neither branch appears willing to accept the political challenge that is inherent in the issue, namely whether the United States ought to subject itself to the scrutiny and judgment of an international court. Yet, the United States is willing to have others do so, whether they be individuals or states. The strong U.S. support for an International War Crimes Tribunal in the case of the former Yugoslavia is a case in point. In that instance much is made, and rightly so, of the need to establish a "rule of law." But that instance of support for the "rule of law" is undermined when the Clinton Administration follows that action with a reservation to the jurisdiction of the International Court of Justice on this Convention. The U.S. leadership on the War Crimes Tribunal can be dismissed by those who wish to do so as support for the rule of law for others but not the United States.

The issue of the jurisdiction of the ICJ in the context of the Race Convention should not raise the specter of an individual U.S. citizen dragged before a court which may or may not apply procedural safeguards which citizens of the United States enjoy within its jurisdiction. This theme formed part of the debate earlier this year in the resolution dealing with a study regarding the establishment of an International Criminal Court. Without going into the merits, or lack thereof, of that particular argument, it simply is not germane to the issue of the jurisdiction of the ICJ in the case of the Race Convention. The jurisdiction of the ICJ applies to dispute settlement between states parties to the Convention, that is, to governments, not individuals. The United States has a worthy although not perfect, record of eliminating racial discrimination in law and policy. As such, it has much to offer the international community based on that experience and little to fear in the way of a challenge before the ICJ.

The reservation to the ICJ that the Clinton Administration proposes will not allow that contribution nor accept the challenge of building the rule of law by taking leadership in accepting ICJ jurisdiction. Rather than recognizing the strengths of this nation and its laws, the proposed reservation assumes weakness and vulnerability. It is inappropriate in this new era as the enduring superpower for the United States to fail to take leadership in this area.

A similar criticism can be addressed to the reservation on private conduct in the proposed package ("2. Reservation: Private Conduct"). Besides seeming to confuse the issues of privacy with the issue of public vs. private conduct, the reservation unnecessarily limits U.S. adherence to the obligations of the Convention. It is questionable whether the Convention obligates the United States to do anything more than it has already done. The kind of legal analysis, for example, as done by the International Human Rights Law Group which will be presented to this Committee, suggests otherwise. The reservation is unnecessary. But that is the least of its problems. The reservation in effect prevents the wealth of experience the U.S. judiciary has had on this issue from informing the development of international law on the matter. The United States, through this reservation, closes the door on any dialogue

on the interpretation of the treaty articles in question. The international community will not benefit from such an action and the reputation of the United States as a leader in the area of civil rights is lessened as a result. The Carter Administration had proposed an understanding on this point. The Clinton Administration should have done likewise. We recommend that the Senate frame this issue as understanding, rather than accept the Clinton Administration's reservation. In our view, the understanding could contribute to the development of International law on the basis of U.S. experience, the reservation will not.

Other provisions in the Clinton package of reservations, understandings and declarations are substantially similar to provisions that have been proposed on other International human rights treaties that have already been voted on by the Senate, for example, the International Covenant on Civil and Political Rights. They include a reservation on freedom of speech, expression and association, ("1. Reservation: Freedom of Speech, Expression and Association") which appears to balance those rights with the right to be free of discrimination, rather than simply limiting rights. The federal-state provision ("4. Understanding: Federal-State Implementation"), although unnecessary, accepts the obligation of the federal government to ensure the fulfillment of the Convention even with respect to matters within the jurisdiction of state and local governments.

The last provision, namely, that the treaty is not self- executing ("5. Declaration: Non-Self-Executing Treaty") is also familiar. It is routinely proposed by the U.S. Government in the process of ratifying international human rights treaties. As we have in each instance in the past, we again object to the inclusion of this provision in the package proposed by the Clinton Administration in the case of the Race Convention. This declaration attempts both to limit the direct internal effect of the Convention and to take the issue out of the hands of U.S. courts. It is an example of the shield the United States sets up that, in effect, prevents U.S. citizens from enjoying fully the rights guaranteed in the international human rights instruments. Since the United States is largely in compliance with the obligations of the Race Convention, and the declaration in no way lessens the obligation the United States undertakes through ratification, we consider the declaration to be unnecessary. U.S. courts are capable of determining whether treaty language was intended to have a direct impact or not, and should be allowed to fulfill this function as well as contribute to the ongoing interpretation of the treaty.

We recognize that race is a factor in the denial of rights in the United States. The laws and policy of non-discrimination are not in practice executed or implemented in such a way as to eliminate race as a factor. In particular, in the areas which are the focus of Amnesty International's mandate, for example, we have concerns with respect to race as a factor in cases of police brutality and certainly with respect to the application of the death penalty in the United States. Both issues have been the subject of Amnesty International reports on the United States.

Ratification of the Race Convention could be an indication that the United States is serious about eliminating all vestiges in law and practice of racial discrimination. The declaration that the Race Convention will not be considered self-executing gives the impression that the United States is not willing to use all its resources to do so, nor to give its citizens all available avenues to challenge discriminatory practices in U.S. courts.

It is the case that the Clinton Administration package proposed for the Race Convention contains fewer reservations, understandings and declarations than those proposed for human rights treaties by previous administrations. This is all to the good. However, it does not appear that the basic philosophy has changed from one administration to the next, namely to shield U.S. law and courts from the impact of the international standards through declaring the treaty non-self-executing and to take a reservation in any instance where U.S. law is not already in conformity with the obligations imposed by the treaty in question. This is an unfortunate stance and one that Amnesty International has consistently objected to. We do so in this case as well.

Amnesty International's position on ratification of international human rights treaties by the United States or any other nation, is that governments ratify without limiting reservations, understandings or declarations. We continue to maintain that position in the interests of building a system for the protection and promotion of the human rights of individuals across the globe that is universal in application, one that sets a single standard to which all governments will be accountable. It is our sincere hope and will be the focus of the efforts of Amnesty International USA to remove limiting reservations on the international human rights treaties. It is with that in mind that we support U.S. ratification of the International Convention on the Elimination of All Forms of Racial Discrimination.

PREPARED STATEMENT OF THE ANTI-DEFAMATION LEAGUE

As an organization that has worked to counteract anti-Semitism and bigotry for over 80 years, the Anti-Defamation League is pleased that the Senate is conducting these hearings and supports ratification of the International Convention on the Elimination of All Forms of Racial Discrimination.

In the years since the Holocaust, a consensus has developed domestically and internationally that racism and ethnic hatred must be universally condemned and must not be allowed to flourish. Drafted in the aftermath of anti-Semitic incidents in Western Europe, this Convention translates that conviction into law and places the U.S. and all signatory nations on record in opposing discrimination.

The U.S. has proclaimed for decades its commitment to ending racial discrimination and has demonstrated human rights leadership by enacting laws implementing the American ideal of equal justice for all citizens. Prompt ratification of the Race Convention will reinforce that commitment at home and increase U.S. credibility and leverage abroad in addressing tensions based on racial or ethnic differences before they erupt in the violence that now marks the global scene.

Now more than ever, the world looks to the U.S. for moral leadership on human rights issues. In this regard, ratification is important to the U.S. and to those throughout the world who look to this country for leadership in upholding international standards and combating discriminatory treatment.

The Anti-Defamation League strongly supports this Convention along with the Administration's proposed reservation on Freedom of Speech, Expression and Association as consistent with the protection of First Amendment freedoms. We urge the Foreign Relations Committee to report favorably on the Convention and hope the Senate will expeditiously ratify it as a means to take leadership in addressing the racism and ethnic conflict that is fomenting in our society and around the world.

LETTER TO SENATOR PELL FROM THE CONNECTICUT BAR ASSOCIATION

CONNECTICUT BAR ASSOCIATION,
MERIDEN, CT,
May 15, 1994.

Senator CLAIBORNE PELL,
Senate Foreign Relations Committee, Washington DC

Re: Race Discrimination Convention

DEAR SENATOR PELL: I write to you on behalf of the Connecticut Bar Association Section of International Law and World Peace ("Section"). The Section supports United States Senate giving its advice and consent to the 1966 International Convention on the Elimination of all Forms of Racial Discrimination ("Convention"). While we believe the United States record in the area of race discrimination is second to none, ratification of this convention is an important step to encourage other states to ratify and *implement* the Convention.

The Convention requires any state party not to sponsor, defend or support racial discrimination by any persons or organizations. While this broad formulation would be unworkable in a vacuum, the Convention goes on to state in Article 5 the various rights which a state must provide regardless of a person's race, color, or national or ethnic origin:

1. The right to equal treatment before all tribunals administering justice.
2. The right to security of the person (ie: the right to be safe from harm).
3. The right to vote.
4. The right to hold public office.
5. The right to freedom of movement within the borders of a state.
6. The right to leave any country.
7. The right to return to one's own country.
8. The right to a nationality.
9. The right to marriage.
10. The right to chose one's own spouse.
11. The right to own property.
12. The right to inherit.
13. The right to freedom of thought and conscience.
14. Freedom of religion.
15. Freedom of speech.
16. The right to peaceably assemble.

17. The right to associate with others.
18. The right to work.
19. Equal pay for equal work.
20. The right to a scheme to protect against unemployment.
21. The right to collectively organize labor.
22. The right to housing.
23. The right to public health.
24. The right to an education.
25. The right to participate in cultural activities.

The Convention also provides for a Committee on the Elimination of Racial Discrimination ("Committee"). The Committee performs an important oversight function for the Convention. The Section believes all of these rights are workable and can be implemented within the United States of America.

For these reasons, the Section urges the United States Senate to give its advice and consent for the United States to become a party to this convention.

Please do not hesitate to contact me immediately if you have any questions.

Most cordially,

HOUSTON PUTNAM LOWRY.

LETTER TO SENATOR PELL FROM HUMAN RIGHTS WATCH

HUMAN RIGHTS WATCH,
NEW YORK, NY,
May 10, 1994.

Senator CLAIBORNE PELL,
Chairman, Senate Foreign Relations Committee, Washington DC

DEAR MR. CHAIRMAN, Human Rights Watch is pleased to learn that the Clinton Administration supports ratification of the International Convention on the Elimination of All Forms of Racial Discrimination. As a nonpartisan international human rights monitoring organization, we write to urge the Senate Foreign Relations Committee not only to approve the Convention, but to do so in a manner that will ensure the broadest protection from racial discrimination while remaining consonant with the civil liberty guarantees of the United States Constitution.

Race discrimination is one of the most serious domestic human rights problems confronting the United States today. Although U.S. legal protection against racial discrimination is generally strong, in practice these legal safeguards continue to go largely unmet. Educational segregation and unequal conditions of schooling persist at all levels; public and private housing are rife with segregation and discrimination; and in employment, African Americans are three times less likely to be hired than whites with similar qualifications. These and other racial discrimination concerns are documented and discussed in the recent report by Human Rights Watch and the American Civil Liberties Union on U.S. compliance with the International Covenant on Civil and Political Rights (copy enclosed).[1]

In this respect, we take issue with the Administration's broad assertion that U.S domestic law provides "effective methods of redress and recourse for those who * * * become victims of discriminatory acts or practices." (Letter from Strobe Talbott to Claiborne Pell, dated April 26, 1994.) To the contrary, the lack of effective remedies is a cause for significant and immediate concern, and illustrates the importance of approving and implementing the Convention in the United States.

Human Rights Watch supports ratification of the Convention on the Elimination of All Forms of Racial Discrimination. As to the Administration's proposed reservations, declarations and understandings, we take the following positions.

1. Reservation: Freedom of Speech, Expression and Association

As with the International Covenant on Civil and Political Rights, we support this reservation as a necessary safeguard for the essential First Amendment protections of speech and association.

2. Reservation: Private Conduct

This reservation limits government regulation of private discriminatory conduct to the extent such regulation is permitted under the Constitution and laws of the

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[1] Human Rights Watch and American Civil Liberties Union, *Human Rights Violations in the United States: A report on U.S. compliance with the International Covenant on Civil and Political Rights* (New York: Human Rights Watch, December 1993).

United States. We agree with the Administration that there exist spheres of private conduct where competing constitutional concerns such as free association prevent government action to eradicate private acts of racial discrimination. Accordingly, Human Rights Watch does not oppose a reservation of this nature. The government's attempt to define this reservation as coterminous with the Constitution and laws of the United States, however, is unnecessarily broad. Some spheres of private discriminatory behavior that do not warrant constitutional protection are nonetheless insufficiently addressed by U.S. law. In these cases, an obligation of government regulation arising under the Convention would be an appropriate and desirable addition to current U.S. law. We recommend modifying the proposed reservation to permit greater regulation of private discriminatory conduct except where overridden by the Constitution of the United States.

3. Reservation: Dispute Settlement

Human Rights Watch opposes this reservation. By requiring the "specific consent" of the United States to the jurisdiction of the International Court of Justice in disputes arising under the Convention, this reservation would allow the United States to decide on a case-by-case basis whether or not to submit to the dispute settlement provisions of Article 22. The Administration defends this proposed reservation on the grounds that "it is prudent for the United States Government to retain the ability to decline a case which may be brought by another country for frivolous or political reasons."

This reservation undermines the authority of the International Court of Justice particularly and the international human rights legal regime generally. It is the task of the International Court of Justice to determine, among other things, the nature and validity of claims brought before it. Reserving the right to recognize the Court's jurisdiction or not, depending on political considerations, seriously compromises the stature and effectiveness of the Court in three important ways. First, it implies that the Court may be incompetent or biased in considering claims brought before it. Second, it participates in and thereby sanctions the unilateral manipulation of the international human rights legal regime. Third, and perhaps most importantly, it encourages other signatory states to follow this example and permit themselves to opt out of Court enforcement on a case-by-case basis. This would debilitate the entire system and render the Convention an empty formality. We strongly urge the Committee to reject this proposed reservation.

4. Understanding: Federal-State Implementation

Human Rights Watch opposes this understanding, which could be interpreted as limiting federal responsibility for the conduct of state and local governments. In our view, U.S. ratification of the Convention should provide a stimulus to the federal government to expand oversight of state and local governments to ensure greater protection from racial discrimination for all Americans, regardless of which governmental entity threatens their basic rights. The necessity of such federal oversight is historically demonstrated by the repeated need for U.S. federal civil rights intervention in areas regulated by state and local government, such as education and law enforcement.

U.S. ratification of the Convention without the attachment of a federalism understanding would also prevent other nations with federal forms of government from using the U.S. understanding as an excuse for not adequately addressing issues of racial discrimination, regardless of which level of government has traditionally exercised jurisdiction.

5. Declaration: Non-Self-Executing Treaty

Human Rights Watch opposes this declaration, which prevents the Convention from creating new or independently-enforceable private causes of action in U.S. courts on the grounds that, "existing U.S. law provides extensive protections and remedies sufficient to satisfy the requirements of the present Convention." (Attachment to letter from Strobe Talbott to Claiborne Pell, dated April 26, 1994.) The intended beneficiaries of the Convention are the individuals who populate the nations of the world, not the nations themselves. The meaningfulness of this protection from racial discrimination will be severely diminished if the United States refuses to allow U.S. citizens to invoke it in U.S. courts. The proposed declaration of non-self-execution, however, will have precisely this effect, denying domestic legal remedies to individuals who seek redress for Convention violations.

The terms of the Convention for the Elimination of All Forms of Racial Discrimination are specific and could readily be enforced by a court of law. There is no reason, short of mistrust of our nation's courts, for the executive branch to fear that U.S. courts will apply the human rights norms guaranteed by the treaty in a less fair way than they apply any other of our nation's laws.

In sum, we urge that all of the reservations, declarations and understandings proposed by the Administration, except for the free speech reservation, be rejected. As for the reservation on Private Conduct, we urge that it be amended as we have described in Point 2. After our suggestions are incorporated, we urge the Senate to give its advice and consent for immediate ratification of the Convention for the Elimination of All Forms of Racial Discrimination.

Sincerely,

KENNY ROTH,
Executive Director, Human Rights Watch.

LETTER TO SENATOR PELL FROM LAWYERS COMMITTEE FOR HUMAN RIGHTS

LAWYERS COMMITTEE FOR HUMAN RIGHTS,
WASHINGTON, DC,
May 11, 1994.

Senator CLAIBORNE PELL,
Chairman, Senate Foreign Relations Committee, Washington DC

DEAR SENATOR PELL We are writing to thank you for holding a hearing on the International Convention on the Elimination of All Forms of Racial Discrimination. We remain deeply grateful for your longstanding advocacy for international human rights. The struggle to end racial discrimination has profoundly shaped this nation's history. It continues today. U.S. ratification of this important international treaty will reinforce and strengthen U.S. commitment to combat racial discrimination. The Lawyers Committee strongly urges U.S. ratification of this Convention and appreciates your leadership on this issue.

We share the Administration's view that the substantive provisions of this treaty are consistent with the letter and spirit of the United States Constitution and laws, both state and federal. The United States can and should accept virtually all of the Convention's obligations and undertakings without qualification.

We are concerned, however, by the reservations, declarations and understandings proposed by the Administration. We believe that only one reservation, relating to limitations on free speech, is constitutionally required. The other qualifications proposed by the Administration are all designed to support the Administration's view that this treaty should not, in any way, change, or commit us to change, anything in U.S. law or practice, now or in the future. It is this view that we strongly oppose.

The qualifications now proposed by this Administration reflect three basic principles; we disagree with these principles. These principles are: (1) that the United States will not commit itself to do anything that would require change in present U.S. law or practice; (2) that the treaty should not be self-executing but should require implementation by legislation; and (3) that subjects within the jurisdiction of the states might be excluded from the obligation of the treaty or left exclusively to implementation by legislation by the states.

The first principle—that the United States will undertake to do only what it is already doing—is incompatible with the object and purpose of the treaty. The purpose of treaties generally is to undertake new obligations or to make a commitment to the international community to adhere to existing obligations. The mere fact that a treaty establishes standards to which the U.S. does not currently adhere is not sufficient reason for a reservation. A specific reservation should be added if a particular treaty provision is found to be unacceptable. But there ought not to be a wholesale rejection of change. If the United States ratifies the Convention subject to broad limitations that imply a lack of political commitment to observe international standards, its actions will rightly be decried by the international community. It will suggest that the U.S. views these international norms as being applicable only in other countries and sees no room for improvement in its own rights performance.

The second principle—declaring the articles of the Convention not to be self-executing—is both constitutionally unnecessary and inconsistent with the spirit of Article 6 of the Constitution as the framers conceived it. There is no reason for insisting that neither the Executive nor the courts should give effect to a treaty until Congress adopts legislation. Adoption of this declaration would undermine one of the principal reasons why the Constitution makes treaties the law of the land and gave the President and the Senate the power to make such treaties. While some articles of the Convention may require Congress to pass appropriate implementing legislation, others do not. Determination of which provisions are and are not self-executing should be made article by article after ratification and by each branch of government for purposes within its responsibility.

The "states' rights understanding" is also unnecessary and undermines the full implications of the treaty. There are few, if any, matters covered by the Convention that are subject exclusively to state jurisdiction. Under the Fourteenth Amendment and other Constitutional provisions, these matters are subject to the treaty and legislative powers of Congress and the jurisdiction of federal courts. If the intention is to clarify that the obligations of the Convention may in some cases be implemented by the states, the Administration should simply say so: it requires no declaration upon ratification, and to make such a declaration would only cause confusion.

In the attached appendix, we have included a brief analysis setting forth our position on the reservations, declarations and understandings recently proposed by the Administration. Overall, the Administration's qualifying language applies one set of rules to the United States and another set of rules to the rest of the world. No other nation including our closest allies has taken this view. We believe it is wrong, and undermines the basic purpose of the treaty. Other counties, including our allies, will view ratification in this manner as hypocritical. They will see it as an attempt by the U.S. to obtain the benefit of being a party to the treaty, without undertaking the obligations that accompany that status.

We are concerned also that U.S. ratification subject to the principle of "no domestic application" may be imitated cynically by other states, which seek the diplomatic benefits of ratification, but cling to the view that adherence to international human rights standards violates their sovereignty.

In our view, ratification of this important treaty in a manner which sets us apart from the rest of the world, and which says, in effect, that international human rights treaties do not apply in the United States, would not serve the advancement of human rights here or elsewhere.

We respectfully request that this statement be submitted for the record.

Sincerely,

MARVIN E. FRANKEL,
Chairman.

Enclosure

APPENDIX—LEGAL ANALYSIS

Article 4: States Parties condemn all propaganda and all organizations which are based on ideas or theories of superiority of one race or group of persons of one colour or ethnic origin, or which attempt to justify or promote racial hatred and discrimination in any form, and undertake to adopt immediate and positive measures designed to eradicate all incitement to, or acts of, such discrimination and, to this end, with due regard to the principles embodied in the Universal Declaration of Human Rights and the rights expressly set forth in article 5 of this Convention, *inter alia:*

(a) Shall declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin, and also the provision of any assistance to racist activities, including the financing thereof;

(b) Shall declare illegal and prohibit organizations, and also organized and all other propaganda activities, which promote and incite racial discrimination, and shall recognize participation in such organizations or activities as an offence punishable by law;

(c) Shall not permit public authorities or public institutions, national or local, to promote or incite racial discrimination.

and

Article 7: States Parties undertake to adopt immediate and effective measures, particularly in the fields of teaching, education, culture and information, with a view to combating prejudices which lead to racial discrimination and to promoting understanding, tolerance and friendship among nations and racial or ethnical groups, as well as to propagating the purposes and principles of the Charter of the United Nations, the Universal Declaration of Human Rights, the United Nations Declaration on the Elimination of All Forms of Racial Discrimination, and this Convention.

Proposed Administration Reservation

The Constitution and laws of the United States contain extensive protections of individual freedom of speech, expression and association. Accordingly, the United States does not accept any obligation under this Convention, in particular under Articles 4 and 7, to restrict those rights, through the adoption of legislation or any

other measures, to the extent that they are protected by the Constitution and laws of the United States.

LCHR Comment

Under the First Amendment of the U.S. Constitution, the government may only penalize speech that incites to imminent lawless action. A reservation emphasizing that U.S. compliance cannot restrict the free speech protections of the First Amendment would be appropriate.

Article 1: 1. In this Convention, the term "racial discrimination" shall mean any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.

and

Article 2 § 1 (c) & (d): 1. States Parties condemn racial discrimination and undertake to pursue by all appropriate means and without delay a policy of eliminating racial discrimination in all its forms and promoting understanding among all races, and, to this end:

(c) Each State Party shall take effective measures to review governmental, national and local policies, and to amend, rescind or nullify any laws and regulations which have the effect of creating or perpetuating racial discrimination wherever it exists;

(d) Each State Party shall prohibit and bring to an end, by all appropriate means, including legislation as required by circumstances, racial discrimination by any persons, group or organization;

and

Article 3: States Parties particularly condemn racial segregation and *apartheid* and undertake to prevent, prohibit and eradicate all practices of this nature in territories under their jurisdiction.

and

Article 5: In compliance with the fundamental obligations laid down in article 2 of this Convention, States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the rights of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights:

(a) The right to equal treatment before the tribunals and all other organs administering justice;

(b) The right to security of person and protection by the State against violence or bodily harm, whether inflicted by government officials or by any individual, group or institution;

(c) Political rights, in particular the rights to participate in elections—to vote and to stand for election—on the basis of universal and equal suffrage, to take part in the Government as well as in the conduct of public affairs at any level and to have equal access to public service;

(d) Other civil rights, in particular:

(i) The right to freedom of movement and residence within the border of the State;

(ii) The right to leave any country, including one's own, and to return to one's country;

(iii) The right to nationality;

(iv) The right to marriage and choice of spouse;

(v) The right to own property alone as well as in association with others;

(vi) The right to inherit;

(vii) The right to freedom of thought, conscience and religion;

(viii) The right to freedom of opinion and expression;

(ix) The right to freedom of peaceful assembly and association;

(e) Economic, social and cultural rights, in particular:

(i) The rights to work, to free choice of employment, to just and favourable conditions of work, to protection against unemployment, to equal pay for equal work, to just and favourable remuneration;

(ii) The right to form and join trade unions;

(iii) The right to housing;

(iv) The right to public health, medical care, social security and social services;

(v) The right to education and training;

(vi) The right to equal participation in cultural activities;

(f) The right of access to any place or service intended for use by the general public, such as transport, hotels, restaurants, cafés, theatres and parks.

Proposed Administration Reservation

The Constitution and laws of the United States establish extensive protections against discrimination, reaching significant areas of non-governmental activity. Individual privacy and freedom from governmental interference in private conduct, however, are also recognized as among the fundamental values which shape our free and democratic society. The United States understands that the identification of the rights protected under the Convention by reference in Article 1 to fields of "public life" reflects a similar distinction between spheres of public conduct that are customarily the subject of governmental regulation, and spheres of private conduct that are not. To the extent, however, that the Convention calls for a broader regulation of private conduct, the United States does not accept any obligation under this Convention to enact legislation or take other measures under paragraph (1) of Article 2, subparagraphs (1) (c) and (d) of Article 2, Article 3 and Article 5 with respect to private conduct except as mandated by the Constitution and laws of the United States.

LCHR Comment

This proposed reservation is unnecessary. The reference to "public life" in Article 1 limits the reach of the anti-discrimination obligations under this treaty. The Convention recognizes that certain limited areas of private conduct should be, and are, beyond the reach of governmental regulation of discrimination. This view is in conformity with U.S. law on discrimination. Thus, there is no conflict between the Convention and U.S. law, and no reservation is necessary. Such a reservation is also highly undesirable. Even if there were a conflict and the Convention required the U.S. to enact new laws to meet the requirements of the Convention, the mere fact that a treaty establishes standards to which the U.S. does not currently adhere is not sufficient reason for a reservation. The purpose of treaties is to undertake new obligations or to make a commitment to the international community to adhere to existing obligations. If the United States ratifies the Convention subject to this broad limitation that implies a lack of political commitment to observe international standards, its actions will rightly be decried by the international community. It suggests that the U.S. views these international norms as being applicable only in other countries and sees no room for improvement in its own rights performance. If the concern of the Administration is that the Convention might require the U.S. to forbid private discrimination which is protected by the Constitution, it is the position of the LCHR that, under settled principles, the Convention may not be construed so as to forbid what is protected by the Constitution. At most, a reservation saying that under this article the U.S. is not required to forbid private discrimination which is protected by the Constitution would be acceptable.

Article 22: Any dispute between two or more States Parties with respect to the interpretation or application of this Convention, which is not settled by negotiation or by the procedures expressly provided for in this Convention, shall, at the request of any of the parties to the dispute, be referred to the International Court of Justice for decision, unless the disputants agree to another mode of settlement.

Proposed Administration Reservation

With reference to Article 22 of the Convention, before any dispute to which the United States is a party may be submitted to the jurisdiction of the International Court of Justice under this article, the specific consent of the United States is required in each case.

LCHR Comment

This proposed reservation is objectionable and sets an unfortunate precedent. When the United States ratified the International Covenant on Civil and Political Rights, it declared that it accepted the competence of the Human Rights Committee to receive and consider communications in which one State Party claimed that another State Party was not fulfilling its obligations under the Covenant. Since the dispute resolution mechanism in this Convention similarly provides for submission by one of two States to an international body for dispute resolution, there is no justification for the U.S. objection. The only difference between the two procedures is, in fact, that, under the Convention, the dispute is submitted to the International Court of Justice. The U.S. is already a party to over 75 treaties which provide for submission of disputes to the ICJ. There is no basis to suspect that the ICJ will fail to render a fair and impartial verdict under those treaties, nor under this Convention.

Articles 1–25

Proposed Administration Understanding

The United States understands that this Convention shall be implemented by the Federal Government to the extent that it exercises jurisdiction over the matters covered therein, and otherwise by the state and local governments. To the extent that state and local governments exercise jurisdiction over such matters, the Federal Government shall, as necessary, take appropriate measures to ensure the fulfillment of this Convention.

LCHR Comment

The proposed language is not constitutionally necessary, nor is it desirable. Federal authority in this area is clear. *Missouri* v. *Holland,* 252 U.S. 416 (1919). Under the Constitution and international law, the federal government has the responsibility and the authority to carry out obligations under the Convention. Although the federal government has the ultimate responsibility to see that these obligations are carried out, it can leave some implementation to the states so long as the United States sees to it that this is done. There are few, if any, matters covered by the Convention that are subject exclusively to state jurisdiction. Under the Fourteenth Amendment and other constitutional provisions, these matters are subject to the treaty and legislative powers of Congress and the jurisdiction of federal courts.

Articles 1–25

Proposed Administration Declaration

The United States declares that the provisions of the Convention are not self-executing.

LCHR Comment

This declaration is not constitutionally required and it is undesirable. There is no reason for insisting that neither the Executive nor the courts should give effect to a treaty until Congress adopts legislation. To do so would go against the spirit of Article 6 of the Constitution as the framers intended it. It would undermine one of the principal reasons why the Constitution made treaties the law of the land, and gave the President and the Senate the power to make such treaties without the consent of the House of Representatives. Incorporation of this declaration will unnecessarily delay U.S. compliance with some provisions and set up unnecessary political obstacles to U.S. compliance generally. Many of the articles will in fact require Congressional implementation, but some might not. Determination of what is or is not self-executing should be made article by article after ratification and by each branch of government for purposes within its responsibility.

Prepared Statement of the Minority Rights Group

[By Bernard Hamilton, Washington Associate]

I appreciate the opportunity to submit this testimony on behalf of the Minority Rights Group concerning the ratification of the International Convention on the Elimination of All Forms of Racial Discrimination.

The Minority Rights Group (MRG) is registered in Britain as an educational trust. MRG was established 25 years ago, in London. It also has offices in Geneva, New York and Washington. MRG is an international human rights non-governmental organization. It is involved in research dissemination, education and advocacy. MRG has produced 200 books, reports, occasional papers and other publications. It is best known for its 100 reports on specific groups or related themes, and the World Directory of Minorities. In addition, we develop educational material, which we produce in close consultation with teachers. Our advocacy is largely in global and regional fora. At the UN, we were involved in the drafting and the adoption of the Minority Rights Declaration. At the Council for Security and Cooperation in Europe, we were able to advise on the mandate of the newly created High Commissioner for National Minorities. Because of its involvement in issues related to minority rights for twenty-five years, the MRG is especially able to understand the significance of this convention, and the importance of its ratification by the United States, in the struggle to eliminate racial discrimination throughout the world. We ask the Senate to consider the following:

RATIFICATION WILL ENHANCE THE UNITED STATES' LEADERSHIP POSITION IN ELIMINATING RACISM

Over the years, the U.S has been a leader in promoting human rights in general and passing minority rights legislation in particular. Legislation passed after the Civil War maintains its viability today, alongside the more recent civil rights acts. Furthermore, the United States played a major role in drafting this Convention. Despite this proud history, and despite the fact it signed the Convention twenty-seven years ago, on September 28, 1966 this country has yet to ratify it. To date, the Convention has been ratified by 138 states, including the UK, France, Germany, Bulgaria and Argentina. Ratification now is necessary for the United States to affirm to the international community and to its own citizens that it is committed to combating racism at every level. In demonstrating its willingness to abide by these rules and by nominating someone to the Committee on the Elimination of Racial Discrimination, the United States maintains its credibility as an international leader in human rights and enhances its ability to prevent violations of these rights.

UNITED STATES PARTICIPATION IN THE COMMITTEE ON THE ELIMINATION OF RACIAL DISCRIMINATION

The Convention provides for the establishment of the Committee on the Elimination of Racial Discrimination (CERD) composed of independent experts elected by member states, which is presently functioning. The CERD's responsibilities include reviewing reports submitted by the States parties on the policies they have adopted towards implementing the Convention. It has also issued several recommendations interpreting governments' responsibilities under the Convention. If it is to participate in the election of members to CERD and thereby influence the interpretation of the Convention, the United States must be a state party.

SUPPORT FOR INTERNATIONAL ELIMINATION OF DISCRIMINATION

The ratification of the Convention by a country as influential in the international arena as the United States would promote the development of, and strengthen, international law. Human rights law would be especially strengthened, which would in turn materially advance the cause of eliminating racism. With the challenges currently facing the international community, such as the emergence of so-called "ethnic cleansing", it is particularly important now to enhance the rule of law internationally.

Dispute Resolution

Article 22 provides for the jurisdiction of the International Court of Justice (ICJ) with respect to international dispute settlement. Because of the high regard in which the United States is internationally held with respect to human rights, U.S. submission to the ICJ's jurisdiction acts to promote the rule of law and encourages other parties' compliance to the Convention. A reservation to Article 22, whereby the U.S. refuses to submit itself to the ICJ's jurisdiction, impedes the Convention's ability to achieve its ultimate goal of eliminating racial discrimination worldwide. If the United States issues such reservation, it will effectively be precluded from bringing suit under Article 22 against violators of the Convention. Under the doctrine of reciprocity, the reservation could be cited against the United States at any time, by any party.

U.S. criticism of the ICJ has frequently focused on issues of judicial bias and jurisdictional overreach. The Senate should recognize however that like the international system itself, the Court is not a staid body, but evolves and matures with time. The nature and work of the ICJ has indeed undergone changes, evidenced by the recent standardizing and streamlining of its procedures. The body of the Court has also been subject to ideological and political changes with the November 1993 election of five new judges. The increased use of the Court by states representative of virtually all regions of the world further indicates its growing support and respect internationally. At the beginning of 1994, ten cases were pending before the ICJ, a substantial increase from years past. Included in these cases are accusations of genocide in the former Yugoslavia, the terrorist airplane bombing over Lockerbie, and the American Embassy hostages case against Iran.

To date, the United States continues to be party to over 75 treaties which provide for the submission of disputes to the ICJ.[1] Yet, there are some who argue that were it to accept the ICJ's compulsory jurisdiction, it is likely to become a political target

[1] Treaty obligations of the United States to submit disputes to the ICJ can be found through the U.S. State Department, *Treaties and Other International Acts Series (T.I.A.S.).*

for baseless propaganda purposes. We are not persuaded by such argument. Specifically with regard to civil rights, the United States has been in the vanguard of nations enacting and supporting progressive anti-discrimination measures; it therefore has little reason to be seriously concerned with such attacks made against it. Threats or fear of frivolous complaints should not subvert the United States' greater interests in supporting and encouraging international human rights standards and enforcement mechanisms.

A reservation to Article 22 will raise international concern regarding the United States' commitment to the Race Convention, suggesting to parties already having ratified the Convention that the United States will not take its obligation to enforce the Convention's provisions seriously. In making a reservation to Article 22, the U.S. puts itself in the company of states such as Libya, Syria, Cuba, and China, who also have reservations to Article 22 currently in force. Support has been shown both at home and abroad for international dispute resolution through the ICJ. Secretary of State Warren Christopher has made known his support of the ICJ, stating at the time of his confirmation hearings before the Senate that U.S. refusal to "cede or grant jurisdiction" and "retaining the right of unilateral withdrawal" sets back the entire international judicial process.[2] Secretary General of the U.N., Boutros Boutros-Ghali, also has urged that parties withdraw their reservations to the Court's jurisdiction in the dispute settlement clauses of multilateral treaties.[3]

Dispute settlement is an integral part of any forceful human rights treaty. The ICJ is the only international body that can operate as a "court of last resort." It thus is the only international forum capable of providing uniformity in decision-making and the possibility of appellate review. We strongly urge that a reservation limiting the jurisdiction of the International Court of Justice not be supported.

THE CONVENTION IS CONSISTENT WITH CURRENT LAW OF THE UNITED STATES

The spirit and provisions of the Convention are similar to U.S. constitutional and statutory law. However, the Minority Rights Group recognizes that there may be some questions which will be raised before the United States Senate will ratify this Convention. Nevertheless, it does not believe any of these problematic provisions really cause practical problems. I will address five points which we think may raise the most questions to illustrate why we do not see anything in the Convention as being inconsistent with U.S. law.

Article 4

The United States Supreme Court ruled in *Dennis* v. *United States,* 341 U.S. 494, 71 S. Ct. 857, 95 L. Ed. 1137 (1951) that Congress has the right to prohibit advocacy, but not mere discussion, of armed rebellion. That is, the First Amendment would protect "peaceful studies and discussions or teaching and advocacy in the realm of ideas." It would not, however, protect the advocacy of a substantive evil that Congress has a right to prevent if there is a clear and present danger of the occurrence of such evil. There is no doubt that Congress has the authority to prevent racist and chauvinist activity if it affects interstate commerce, is supported in some way by governmental action or threatens another citizen's civil rights. See, for example, U.S. Constitution, Amend. XIV, 42 U.S.C. 1983, 1985, 2000e, et seq., etc.

Thus, a reasonable and, we think, appropriate interpretation of the treaty would be that it prohibits the advocacy of attacks on, and discrimination against, minorities under circumstances where such advocacy would have the likely effect of resulting in attacks or discrimination being attempted, whether successfully or not. The statutes I have cited, and many other federal, state and local laws and ordinances, do very much the same thing. The Convention, however, makes this a matter of governmental policy to which the United States is committed internationally.

The Convention would not require that the United States prohibit the discussion of such ideas. Indeed, such an interpretation would severely limit discussion of the merits of the treaty itself, to say nothing of the evils it seeks to eliminate. The discussion of such doctrines as Nazism, fascism, apartheid and racism is both healthful and necessary to a free society seeking to rid itself of them. Only through the discussion of such ideas in a free and open way will they be finally laid to rest. In the meantime, however, all democratic governments have the obligation to officially oppose them.

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[2] Senate Foreign Relations Committee Hearing, Nomination of Warren Christopher to be Secretary of State, 1/13/93 (statement of Warren Christopher).

[3] Federal News Service, 1/25/94, *Secretary-General Says International Court of Justice Is Beacon That Must Carry Light of International Law* (taken from text, translated from French, of Secretary-General Boutros Boutros-Ghali delivered at the Hague, 1/20/94).

Affirmative Action

The clear language of Articles 1(4) and 2(2) imposes on the signatory states no requirements that have not already been endorsed by the Supreme Court. While some may interpret the Convention to say that these provisions require affirmative action, the fact is they merely declare that affirmative action-type programs are appropriate when necessary to ensure or promote equality. This is no more than the Supreme Court did in the case of *United Steelworkers* v. *Weber,* 443 U.S. 193, 99 S. Ct. 2721, 61 L. Ed. 2d 480 (1979).

WHETHER THE CONVENTION SHOULD BE SELF-EXECUTING

The Minority Rights Group does not believe that a declaration that the Convention is not self-executing is appropriate. Such a declaration would not alter the United States' international responsibilities and commitments under the Convention. It would, on the other hand, keep individuals from taking advantage of it as an additional argument to support their claims in U.S. courts. The effect would be to dilute the force of the Convention as ratified by the Senate and to call into question, on an international level, the commitment of the United States to the elimination of racial discrimination within its own borders.

Private Conduct-State Action

The issue of regulating private conduct is found in Articles 2(1)(c), 2(1)(d), 3 and 5. The Minority Rights Group opposes a reservation on this point, as it is unnecessary in light of existing U.S. constitutional and federal law.

Federal-State Relations

The issue of the effect of the Convention on the rights of individual states in relationship to the Federal government may arise in terms of Articles 2(1)(a), 2(1)(c), 2(1)(d), 3, 4(c), 5, 6 and 7. The Minority Rights Group believes a reservation on this issue is unnecessary in light of the Constitution, specifically the 14th Amendment and existing U.S. law, including the civil rights laws I have already alluded to.

CONCLUSION

It is time, indeed past time, for the United States to ratify the International Convention on the Elimination of All Forms of Racial Discrimination. The benefits of ratification are significant, and should not be muted by the Administration's proposed package of reservations, declarations and understandings. Traditionally, the United States has held a leadership position in the expansion of the concept of human rights and the commitment of the international community to protect them. It is minorities who frequently fall victim to racial discrimination, and who are all too often discussed under the reporting procedure under the Convention. Ratification of the Race Convention affords the United States an opportunity to specifically advocate for the rights of minorities internationally. Much has been achieved over the years when this country makes human rights a centerpiece of its international policy. Ratification will affect the advancement of human rights in this country, and around the world. The Minority Rights Group urges the Senate Foreign Relations Committee to recommend that the Senate give its advice and consent to ratification with maximal speed and minimal reservations.

PREPARED STATEMENT ON BEHALF OF THE MINNESOTA ADVOCATES FOR HUMAN RIGHTS AND THE MINNEAPOLIS COMMISSION ON CIVIL RIGHTS

I. INTRODUCTION

Thank you, Chairman Pell, for the invitation to speak before your committee.

I am testifying today as a representative of the Minnesota Advocates for Human Rights and the Minneapolis Commission on Civil Rights. The Minnesota Advocates was formed in 1983 and is headquartered in Minneapolis. It is a nonprofit organization working internationally to prevent human rights violations, to protect individuals who are targets of government abuse, and to prosecute abusers. The group has over 1000 members from all professions and communities and from all over the country. Over a third of these members are active volunteers.

The Minneapolis Commission on Civil Rights was established in 1975 to implement the city's civil rights policies. The Commission accomplishes this task through public information, education, mediation, conciliation, and enforcement, including damages and other relief. The Commission has 21 members, all of whom are appointed by either the Mayor or the City Council for three-year terms.

The Minneapolis Commission on Civil Rights has played an important role in promoting and protecting the civil rights of the citizens of Minneapolis. In this role, the Commission has adopted a resolution recommending ratification of the International Convention on the Elimination of All Forms of Racial Discrimination.

Mr. Chairman, I would ask your permission to submit for the record a copy of that resolution and my written testimony regarding the structure and functions of the Committee on the Elimination of Racial Discrimination. [Thank you] While my testimony today will concentrate on the structure and functions of the Committee on the Elimination of Racial Discrimination, I would first like to explain why U.S. ratification of the Convention is so important.

Racial discrimination is a worldwide problem that requires a global response. In every region of the world, individuals are denied basic rights on the grounds of race, color, descent, and national or ethnic origin. The horrors in Bosnia are a graphic example of such abuses. Indeed, the recent outbreak of racial and ethnic conflict in many countries gives more urgency to strengthen international efforts against discrimination.

In 1965, the United Nations promulgated the treaty against racial discrimination that is the subject of today's hearing. The United States shares the fundamental concerns contained in the Race Convention. The U.S. Constitution and a well-developed body of federal and state laws work to combat various forms of racial discrimination in our society. It is important to note that the Race Convention is not meant to replace U.S. law in this area but to enhance it.

The United States is seen as a human rights leader in the world community. Ratification of the Race Convention will confirm and support that leadership by reaffirming U.S. support for racial equality and expanding U.S. participation in the United Nations human rights treaty body system.

In 1980, then Deputy Secretary of State Warren Christopher spoke of human rights as a major element of U.S. foreign policy. He emphasized that "the [international] human rights conventions and other basic documents make clear that the values we are seeking to advance are global values." It is essential for the United States to continue promoting the global values of respect for others. By ratifying the Race Convention, the United States will show that it remains committed to the advancement of these values both domestically and internationally.

The United States played an invaluable role in the drafting of the Race Convention. In fact, the U.S. member of the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities, Morris Abram, proposed a draft Convention to the Sub-Commission and major portions of that text were eventually included in the final version. The U.S. took the next step when President Lyndon Johnson signed the Race Convention on September 28, 1966. Unfortunately, the United States did not follow through its commitment and we are still discussing ratification twenty-eight years later and after 137 nations have already ratified.

The Senate has in the last few years given its Advice and Consent on four other important human rights instruments: the Convention on the Prevention and Punishment of the Crime of Genocide, the Convention Against Torture and Other Cruel Inhuman or Degrading Treatment, the International Covenant on Civil and Political Rights, and the Convention on the Abolition of Forced Labor. Giving Advice and Consent on the Race Convention is the next logical step.

By ratifying the Race Convention, the United States can play a more effective role in the international protection of fundamental rights for people of all races and ethnic groups. Through the reporting procedure, the U.S. approach to combating racial discrimination could contribute to a better understanding of possible measures toward solving common problems faced by all states. As a State Party, the U.S. will be eligible to nominate a candidate for election to the Committee on the Elimination of Racial Discrimination, which monitors States Parties' implementation of the Convention.

II. THE COMMITTEE

A. Structure

Mr. Chairman, I mentioned that by ratifying the Race Convention, the United States will participate in and influence the implementation of the Convention. This participation will be accomplished through the Committee on the Elimination of Racial Discrimination, known as CERD. The Committee monitors States Parties' implementation of laws and policies aimed at protecting against racial discrimination. It performs this function through State Party reporting, individual communications, and Committee recommendations.

Although financial problems have caused the Committee to meet less frequently in the past, this year it met in Geneva for two sessions of three weeks. In future years the Committee expects to meet for three weeks every March and August.

The Committee consists of 18 independent experts elected by States Parties (but serving in their personal capacity) with consideration being given to geographical balance and representation of different legal systems of the world. Its present membership consists of four Western Europeans, three Eastern Europeans, three Africans, four Latin Americans, and four Asians.

Committee members serve four-year terms that are staggered so that nine members are elected or re-elected every two years. The current chairperson is Luis Valencia Rodriguez of Ecuador.

B. Reporting

Under Article 9 of the Convention, States Parties agree to submit to the Committee reports regarding "the legislative, judicial, administrative or other measures they have adopted" in order to implement the Race Convention. Accordingly, the United States should submit its first report within one year of ratification and then provide updates every two years after that. The Committee may request a report at any time—for example, if an emergency arises.

The Committee has adopted general guidelines to assist the States Parties in preparing comprehensive reports that adhere to a common structure. This structure follows the Race Convention article by article and reports must contain certain detailed information regarding laws and practices in the reporting country.

The Committee reviews the report and asks the representative of the submitting State Party to come before it to answer any clarifying questions that Committee experts might have. In some cases, the Committee may request information from a State Party in addition to the material included in the report. The Committee examines whether the State Party has implemented effective legal protections for those groups that have experienced discrimination. The Committee also examines other evidence of *de facto* discrimination. In conducting its examination, the Committee may use information that the State Party did not offer including information and statistics from nongovernmental organizations.

After the State Party has replied to the Committee's questions, the Committee makes concluding observations regarding the positive and negative aspects of the report and the situation in the reporting State. Finally, it may make suggestions on how the reporting State could improve its application of the Convention, in the light of international experience. These suggestions are not legally binding.

In August 1991, the Committee began the practice of considering a State Party's past reports even if the State Party has failed to submit a current report. The Committee compares the past report with any current information about the situation in that State. It then makes observations and suggestions based on this comparison. This new practice has already borne useful results with several governments bringing their reports up to date.

C. General Recommendations

Since its inception in 1969, the Committee has issued seventeen general recommendations interpreting portions of the Race Convention and States Parties' duties under the Convention. These recommendations are important because they provide authoritative interpretations of the Convention and States should abide by the recommendations when implementing the Convention.

For example, in General Recommendation XIII, the Committee called on States Parties to review and improve the training of law enforcement officials so that the standards of the Convention as well as the Code of Conduct for Law Enforcement Officials (1979) are fully implemented. In General Recommendation XVII, the Committee recommended that States Parties establish national institutions to facilitate the implementation of the Convention through monitoring legislative compliance, reviewing policies toward protection against racial discrimination, and educating the public. See *U.N. Doc. A/48/18 (1993), Chapter VIII.*

D. State-Against-State Complaints

Under Article 11 of the Race Convention, a State Party may help the Committee enforce compliance with the Convention by informing the Committee of another State Party's failure to "give effect to provisions of [the] Convention." The Committee transmits the complaint to the relevant State Party, which may reply to the Committee with an explanation or clarification of the situation. No State-against-State complaints have yet been submitted to the Committee, but the procedure could prove useful in the future.

E. Individual Complaints

An important feature of the Race Convention is its individual complaints procedure under Article 14. A State Party has the option of recognizing the competence of the Committee to receive petitions from individuals or groups of individuals in

the State who claim to be the victims of violations of the rights provided in the Convention. The Committee will accept petitions only if petitioners have exhausted available local remedies, including petitioning a body that the State Party has declared competent to accept petitions (if such a body exists).

Although individual communications are confidential and the Committee will not reveal the petitioner's name to the State Party without the petitioner's permission, the Committee will not receive anonymous petitions. The State Party is informed of the communication and has three months in which to reply to the Committee with an explanation of the matter or with information about any remedies the State has taken.

If the Committee accepts the petition it will render a decision based on all of the information it receives from the petitioner and the State Party. The decision, the State Party's observations, and any suggestions or recommendations made by the Committee are then published in the Committee's annual report.

To date, the Committee has received very few petitions because only 18 States Parties have recognized the competence of the Committee to consider individual complaints and the procedures are not well known in those States. Consequently, the Committee has rendered only four decisions. In its most recent decision, however, the Committee held that the Netherlands had an obligation to investigate incidents of racial discrimination with due diligence. It also held that the mere existence of a law making discrimination a criminal act was insufficient to protect the rights embodied in the Race Convention if the authorities did not use the law to prosecute alleged offenders. *L.K.* v. *The Netherlands, Committee on the Elimination of Racial Discrimination, Opinion of 16 March 1993.* Pursuant to its approach to international treaties, the Netherlands will give this Committee decision full domestic effect. Other States Parties, however, may not pursue the same approach to Committee decisions.

F. Good Offices

In August 1992, the Committee offered its good offices to Bosnia, Croatia, and Serbia. The Serbian government accepted the offer and in late November and early December 1993, three members of CERD visited Kosovo to help establish a dialogue between the Serbian authorities and the representatives of the Albanians from Kosovo and to make useful suggestions pertaining to Kosovo. A member of the Committee is also to undertake a technical assistance visit to Croatia.

A similar offer of good offices has been extended to Papua New Guinea. It is possible that good offices missions will become more frequent in the future as the Committee becomes even more involved in combating racial discrimination in critical situations.

III. CONCLUSION

The Race Convention is evidence of the commitment shared by many nations to work against racial discrimination. The Committee on the Elimination of Racial Discrimination plays a key part, because of its scrutiny of government compliance with the Convention. Regular reports and individual communications help encourage States Parties to fulfill their international obligations under the Convention.

By ratifying the Race Convention, the United States will have the opportunity to contribute to the Committee process described above. U.S. involvement will strengthen the process and ensure that States Parties are held accountable for their human rights records. Without ratification, however, the United States will not effectively participate in or contribute to the protection of racial and ethnic rights around the world at a time when its contribution is urgently needed.

The Minnesota Advocates for Human Rights and the Minneapolis Commission on Civil Rights urge you to recommend the Advice and Consent of the Senate to the International Convention on the Elimination of All Forms of Racial Discrimination.

Thank you very much for your time and attention.

PREPARED STATEMENT OF THE WORLD FEDERALIST ASSOCIATION

[By John B. Anderson, President, World Federalist Association]

The World Federalist Association wholeheartedly supports the long-overdue U.S. ratification of the Convention on the Elimination of All Forms of Racial Discrimination. Ratifying this important human rights document will add credibility to U.S. policy and actions in addressing human rights abuses throughout the world. We applaud President Clinton for furthering the ratification process of this treaty.

We are, however, saddened by the reservation made by the State Department against U.S. acceptance of the compulsory jurisdiction of the International Court of Justice. The post Cold War era affords new opportunities to develop peaceful means

for maintaining international peace and security. The pursuit of justice on an international scale is a crucial element to bringing peace to the global community. The rule of law must be a binding force, both to promote standards of justice and to become an effective deterrent to violations of international law. The force and credibility of international law is crippled when subject to special interpretations of individual nation states.

As a leader the application of civil rights laws to its own society, the U.S. should pave the way to a world governed by the force of law, not the law of force. We should accede to the jurisdiction of the World Court and thereby imbue its edicts with meaning. Such steps towards strengthening the international legal order were recommended by the recent bipartisan U.S. Commission on Improving the Effectiveness of the U.N. One of their proposals on strengthening the U.N. noted that "to set a standard of leadership, the U.S. consider reaccepting the compulsory jurisdiction of the [International] Court [of Justice] under Article 36(2)."

Also troubling is the U.S. understanding that this treaty be non self-executing. The vision of the U.N. Charter is one of the rule of law replacing the use of force in resolving conflicts. Article VI of the U.S. Constitution acknowledges that "all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land." These two documents form the basis for strong U.S. advocacy of an effective international legal order capable of solving disputes through peaceful means. The U.S., with its long tradition of the pursuit of justice, should lead in developing such a legal order, accepting the jurisdiction of the International Court of Justice, and considering international treaties once ratified by the U.S., to be self-executing.

PREPARED STATEMENT OF WILLIAM L. ROBINSON, DEAN, THE DISTRICT OF COLUMBIA SCHOOL OF LAW

Mr. Chairman and members of the Senate Foreign Relations Committee, as Dean of the District of Columbia School of Law and an ardent civil rights attorney for the breadth of my professional career, I submit this written statement in support of the International Convention on the Elimination of All Forms of Racial Discrimination and ask that it be included in the record of the hearings on the Convention.

The District of Columbia School of Law (DSCL), with a student population exceeding 284, is dedicated to teaching and developing advocates for the rule of law, domestic and international lawyering. My personal commitment to DCSL's mission is an extension of my civil rights advocacy as former Executive Director of the Lawyers Committee for Civil Rights Under Law during the 1980's and numerous years of legal work in the civil rights movement. As Dean of the Law School, I led a public forum offered to educate District of Columbia residents about the International Convention on the Elimination of All Forms of Racial Discrimination (the Race Convention) and how U.S. ratification would affect everyday people.

I commend the Clinton administration for submitting the Convention to the United States Senate for hearings, after many years of neglect by administrations following 1978, when President Carter submitted the Race Convention for the Senate's advice and consent. And I commend this Senate Foreign Relations Committee for acting expeditiously and swiftly to hold hearings.

Today America is euphoricly celebrating the installation of a democratic government in South Africa and we are celebrating the 40th anniversary of *Brown* v. *Board of Education*. Each signals the end of de jure racial discrimination respectively in South Africa and in the United States. Yet we are painfully reminded daily about apocalyptic racial discrimination, symbolized by the Bosnia/Serbian war and elsewhere.

I caution the Committee to seriously review the policies expressed by the United States in the proposed Reservations, Understandings, and Declarations offered by the State Department. The Committee should not approve them *carte blanche* under the rubric of moving swiftly towards ratification of the Convention, after years of neglect.

I ask the Committee, in conjunction with the State Department, (1) to revise the proposed reservation to the International Court of Justice (ICJ) jurisdiction; and (2) to clarify the definition of "public life" in consideration of our legal concept of "state action." Finally, I express our support for a self-executing treaty, recognizing that this would create a separate cause of action to have civil and human rights violations redressed in American courts. Otherwise, I believe that the treaty requires no implementing legislation, and in fact, moves our government toward promoting racial tolerance rather than merely prohibiting racial discrimination.

Reservation to ICJ Jurisdiction. In deliberating upon the proposed reservation to ICJ jurisdiction, the Committee should ascertain if the reservation is consistent with or expressive of the United States' policy on U.S. submission to ICJ jurisdiction. I suggest that it is not. As a nation, we urge governments to submit disputes, including human rights disputes, to tribunals as the ICJ; we should not exempt ourselves from being subjected to justiciable cases and controversies in the ICJ. Furthermore, we should not leave a case by case decision on U.S. submission to ICJ jurisdiction under the Race Convention subject to the politics of changing political administrations in the White House, Republican or Democratic.

It was a Republican administration that initially refused ICJ jurisdiction in the Nicaragua case, while, as a matter of national policy, a majority of the American public and the democratically controlled Congress expressed outrage. Of the same stock, another Republican administration conditioned ICJ jurisdiction over the United States in cases arising under the Torture Convention and the Genocide Convention.

The Democratic Clinton administration started out strongly supporting human rights conventions and ICJ jurisdiction. Secretary of State Warren Christopher when asked to comment on the American Convention on Human Rights and the Genocide Convention testified during his confirmation hearings that:

> Yes, I have (some personal experience with the Human Rights Convention) and I think it is unfortunate that our (America's) record is not better. Indeed, our record across the board is fairly abysmal. In the International Court of Justice, our refusing to seat or grant jurisdiction and our retaining the right of unilateral withdrawal is one of the things that sets back the entire enterprise. If the leading nation in the world feels that when it does not want to risk a bad outcome it simply picks up its marbles and goes home, that is a very unsatisfactory result. *(Hearings before The Committee on Foreign Relations on the Nomination of Warren M. Christopher to be Secretary of State,* Jan. 13, 14, 1993, pg. 72, 73)

Yet, that very result would be etched in stone by the proposed ICJ reservation to the Race Convention, submitted by Secretary Christopher's State Department. I do not find the reservation supportable and urge the State Department to continue along Secretary Christopher's initial path of strongly supporting human rights conventions and ICJ jurisdiction.

i.) *Continuation of U.S. Policy Under the Torture and Genocide Convention.* Now the State Department contends that their proposed reservation continues U.S. policy on ICJ jurisdiction expressed under the Torture and Genocide Conventions. Let me point out the contrary. Orchestrated by recent Republican administrations, the ICJ reservations under these two human rights conventions are exceptions to the general U.S. policy, spanning the 75 or more treaties and conventions to which the U.S. is a party, of agreeing to having disputes submitted to ICJ jurisdiction.

The Torture and Genocide conventions respectively provide that:

> Pursuant to Article 30(2) of the (Torture) Convention, the United States declares that it does not consider itself bound by Article 30(1), but reserves the right specifically to agree to follow this or any other procedure for arbitration in a particular case.

And,

> That with reference to Article IX of the (Genocide) Convention, before any dispute to which the United States is a party may be submitted to the jurisdiction of the International Court of Justice under this article, the specific consent of the United States is required in each case.

Yet the United States is not bound in each human rights convention to follow the Torture and Genocide exceptions to our general policy of supporting ICJ jurisdiction. If ICJ jurisdiction is acceptable as a general rule in commercial cases, as the case the United States filed against Iran in the early 1980's, then as a consistent policy ICJ jurisdiction should be equally acceptable as a general rule in human rights cases. Moreover as Secretary Christopher said during his confirmation hearings: "our refusing to seat or grant jurisdiction and our retaining the right of unilateral withdrawal (regarding the ICJ) is one of the things that sets back the entire enterprise." As a general rule of foreign policy, the United States should not retain the unilateral right to withdraw from the ICJ, as would be authorized in the State Department's proposed reservation.

ii.) *Article 22 Serves No Practical Role.* Since the ICJ has no cases filed under the Race Convention, the State Department concludes that the ICJ has had no practical

role under the Convention. I join the NGO's in saying that this conclusive presumption is not supported by the underlying fact. No cases have reached the Committee on the Elimination of Racial Discrimination and *ad hoc* commissions under the Race Convention have been effective in resolving matters under the Convention. This does not negate the practical role served by the ICJ as a juridical body under the Race Convention. Moreover, since its formation, the ICJ has grappled with initial questions of jurisdiction, and the United States has supported the ICJ exercise of jurisdiction as an impartial international tribunal; at least until the 1980 Republican reign at the White House and now the State Department.

iii.) *Opportunities Within U.S. Legal System to Redress Rights.* The State Department contends that the ICJ is not needed as there are opportunities within the U.S. legal system to redress civil and human rights violations. However, I point out that the Race Convention does not negate, endanger, threaten, chill, or infringe in any way the opportunities within the United States for redressing human and civil rights. Indeed, the judicial system within the U.S. should be exhausted before disputes against the U.S. can be considered initially by the Committee on the Elimination of Racial Discrimination under the Race Convention, Art. 11 Para. 3. The Race Convention does, however, require the United States laws and their enforcement to be in harmony with the international legal standards in the Race Convention, hence in addition to our body of constitutional and statutory laws, human and civil rights protections against Racial Discrimination have another foundation in the Race Convention.

iv.) *Need for U.S. to Refrain From Participating in a Race Contention Case.* The State Department contends that frivolous or political cases present instances in which the U.S. needs to refrain from participating in a Race Convention case. Yet, the State Department points out that no Race Convention cases, and I add frivolous, political, or otherwise, have been filed with the ICJ. Given the dearth of cases, I ask the Senate Foreign Relations Committee to consider the plausibility, not just the likelihood, of frivolous or political cases being filed against the United States; after being exhausted through the U.S. courts, being considered by the Race Convention Committee, and then being filed with the ICJ. Moreover, the ICJ has the procedural and substantive means, as well as the technical expertise, to ferret out frivolous and political cases and to proceed with substantive cases. After all, the U.S. did resort to the ICJ for its substantive case against Iran!

Considering the above comments, and the expertise among the Senate Foreign Relations Committee, again I urge the Committee to work with the State Department on revising their proposed reservation to ICJ jurisdiction.

Public Life and State Action. The Race Convention, Article 1 which defines Racial Discrimination and other provisions, refer to "public life"; yet, the Convention does not define that term. I submit an analogy that domestic law broadly outlaws racial discrimination by or under color of any state action. While racial discrimination by private conduct is outlawed only partially. For example, the 1964 Civil Rights Act, Title VII outlaws racial discrimination in employment by private employers with 15 or more employees while Title II of that same act outlaws racial discrimination in only public places and does not reach private clubs or private places. I favor outlawing racial discrimination by private parties or by governmental action and encourage the Senate Foreign Relations Committee to consider the breadth of domestic laws and principles, to balance freedom of speech and of association, and to reach an understanding that we should not condone racial discrimination by either state action or private conduct.

Self Executing Convention. The State Department proposes a declaration that the Race Convention is not self executing. I favor interpreting the Convention as being self executing. This is a progressive interpretation of the Convention and we should support it.

No Implementing Legislation. Congress need not enact any legislation for the effective implementation of the Race Convention. While dominant over domestic statutory laws, many of the provisions in the Race Convention are harmonious with domestic laws prohibiting racial discrimination in housing, education, voting, criminal justice, public accommodations, and other sectors in American society. Also, affirmative action and other special measures are permissible to correct past racial discrimination under U.S. domestic law as well as under the Race Convention, Article 1, Paragraph 4 and Article 2, Paragraph 2.

Promotion of Racial Tolerance. The Race Convention exceeds U.S. laws, which prohibit racial discrimination, and encourages governments to promote racial understanding, tolerance and friendship. Article 7 states that:

> State parties undertake to adopt immediate and effective measures, particularly in the fields of teaching, education, culture and information, with a view to combating prejudices which lead to racial discrimination and to promoting understanding, tolerance and friendship among nations and racial or ethnical groups, as well as to propagating the purposes and principles of the Charter of the United Nations, the Universal Declaration of Human Rights, the United Nations Declaration on the Elimination of All Forms of Racial Discrimination, and this Convention.

This article calls for governmental action, policies, programs, and other measures which on a positive note promote racial tolerance. This provision is unparalleled in domestic law; it provides a distinct international legal basis within the United States for governmental action to promote racial tolerance. Article 7 should not be interpreted by the United States as restricting U.S. Constitutional First Amendment rights, an admonition expressed by the State Department which I share.

Free Speech Protections. I urge the United States to reserve protections for our freedom of speech, as amply protected in the State Department's proposed reservation. With this or a substantively similar reservation, the Race Convention does not apply when it would violate our freedom of speech rights.

Definition of Racial Discrimination. The Senate Foreign Relations Committee needs no reminder about the breadth of races protected by the Convention. However, the legislative record on the Senate's advice and consent to the Race Convention should be clear that the Convention covers anti-Semitism and like discrimination because of one's ancestry or ethnic characteristic, as articulated by the U.S. Supreme Court in *Saint Francis College* v. *Al-Khazraji*, 55 LW 4626, at 4629 (1987) and applied in *Shaare Tefile Congregation* v. *Cobb*, 55 LW 4629 at 4630.

In conclusion, I support ratification of the Race Convention, yet I urge the Senate Foreign Relations Committee to refrain from quick action and allow time for the Committee to obtain modifications of the proposed reservation to ICJ jurisdiction. The American public expects the Senate to deliberate and work as an equal partner in executing its constitutional function to offer the President the Senate's advice and consent on the Race Convention. Thank you.

LETTER TO VICE PRESIDENT GORE FROM THE YALE LAW SCHOOL

YALE LAW SCHOOL,
NEW HAVEN, CT,
June 1, 1994.

HON. ALBERT J. GORE, Jr.,
President, U.S. Senate, Washington, DC.

DEAR VICE PRESIDENT GORE: The International Convention on the Elimination of All Forms of Racial Discrimination was signed by the United States in 1966 and transmitted to the Senate for its advice and consent to ratification in 1978. In recent years, the Senate has advised and consented to the Genocide Convention and, most recently, to the Covenant on Civil and Political Rights. We write now to urge the Senate to give its advice and consent to the Convention as soon as possible.

The United States has acknowledged and legislated effectively against the racial discrimination which has been an unfortunate part of our historical legacy. Thanks to Congress, the Executive and the Judiciary, United States law is now well beyond the minimum requirements of the International Convention on the Elimination of All Forms of Racial Discrimination. With the exception of Article 4, which is inconsistent with our Constitution as interpreted by the Supreme Court in *Beauharnais* v. *Illinois*, 343 U.S. 250 (1952), and should be the subject of a reservation, and the reservation concerning individual privacy recommended by Acting Secretary of State Strobe Talbott, the substance of the Convention raises no serious problems for U.S. jurisdictions.

The reason why it is important for the United States to become an active part of this Convention and its implementation mechanisms is not for ourselves—at least in the immediate or direct sense. Racial discrimination has become an explosive political issue in many states since the end of the Cold War. Many of these states could be engulfed in serious internal conflicts, with geo-strategic implications and massive refugee outflows. Many of these states are parties to the Convention and its mechanisms could apprehend and avert some of these potential conflicts. Unfortunately, without the leadership of the United States, we do not believe that the Committee established by the International Convention will be effective. If, however, we become party to this Convention and take an active role in the Committee,

we believe that the International Convention's mechanism can play a significant role in deterring or repairing gross cases of racial discrimination. Our national interest, as a moral and a pragmatic matter, in averting or ending such conflicts is clear. We should become parties to this Convention because it is right, because it serves our interests and because it could be an important instrument of policy for shaping the world in which we live.

Sincerely,

MYRES S. MCDOUGAL,
Sterling Professor of Law, Emeritus.

RUTH WEDGWOOD,
Professor of Law.

W. MICHAEL REISMAN,
Hohfeld Professor of Jurisprudence.

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ISBN 0-16-044740-2